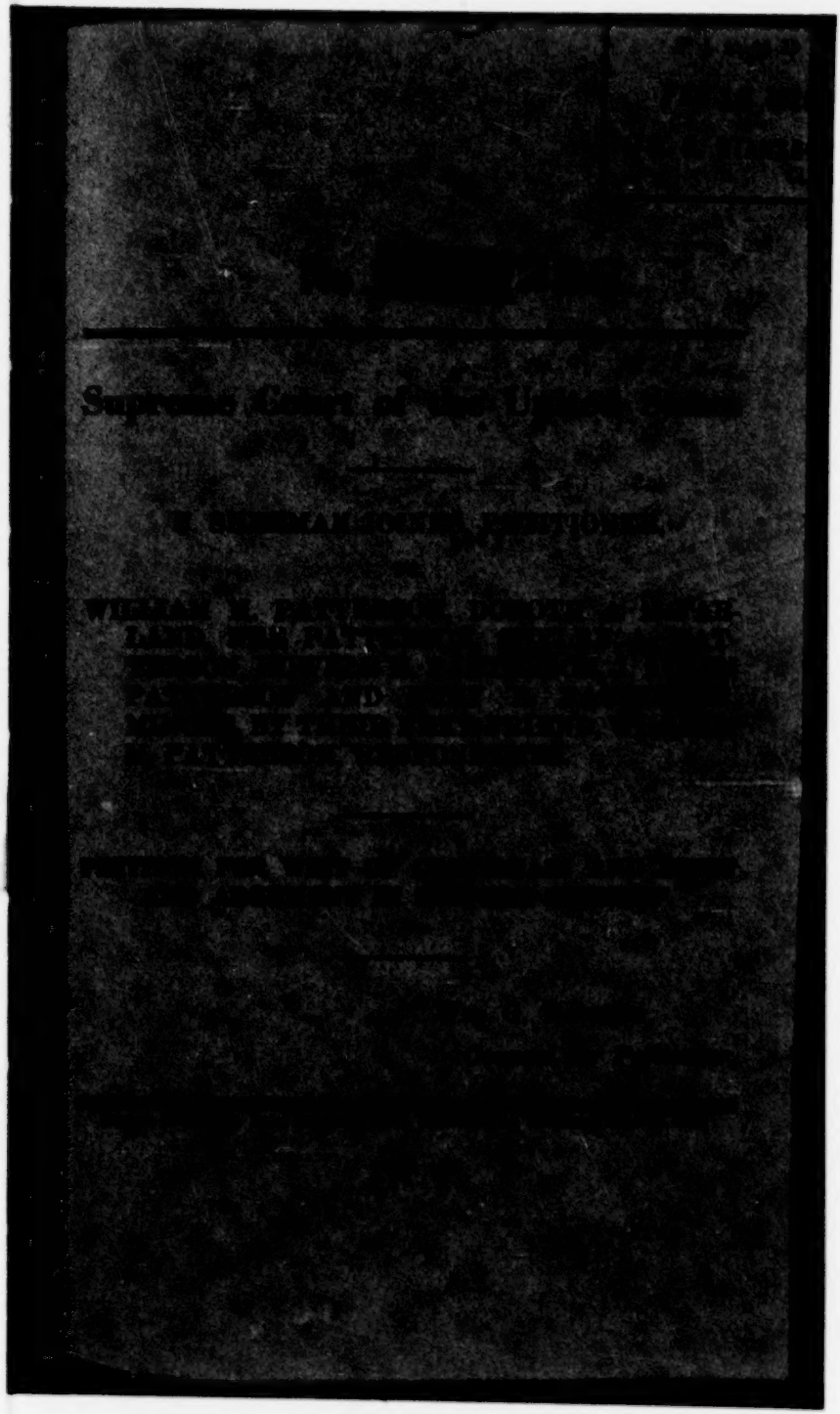

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Supreme Court of the United States

U. SHERMAN JOINES, PETITIONER,

vs.

WILLIAM M. PATTERSON, DOROTH A McFARLAND, NEE PATTERSON, SHELBY A. PATTERSON, HOWELL M. PATTERSON, J. ALLEN PATTERSON AND RUBY E. PATTERSON, MINORS, BY THEIR NEXT FRIEND, WILLIAM M. PATTERSON, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, U. Sherman Joines, respectfully shows to the Court that on the 26th day of May, 1921, there was a judgment rendered in the District Court of Murray County in the State of Oklahoma in favor of your petitioner and against the respondents, adjudging, in effect, that this petitioner was the legal owner of the following lands and premises, to wit:

The east half of the northeast quarter and the east half of the west half of the northeast quarter and the northwest quarter of the southwest quarter of the north

east quarter and the west half of the northwest quarter of the northeast quarter, and the north half of the northwest quarter and the northeast quarter of southeast quarter of Section 31, Township 1 South, Range 1 West, and also the west half of the northwest quarter of the southeast quarter of Section 8, Township 2 South, Range 1 West, containing 280 acres, more or less, according to the United States Survey thereof, located and situated in Murray County, State of Oklahoma,

and

The west half of the northeast quarter of the northeast quarter of Section 27, Township 2 South, Range 6 West, containing 20 acres, more or less, according to the United States Survey thereof, located and situated in Stephens County, State of Oklahoma,

and

The north half of the northwest quarter of the northeast quarter and the southwest quarter of the northwest quarter of the northeast quarter and the southeast quarter of the southeast quarter of Section 12, Township 2 South, Range 2 West of the Indian Base Meridian, located and situated in Carter County, State of Oklahoma, containing 70 acres, more or less, according to the United States Survey thereof.

Also further adjudging that the respondents herein had no right, title or interest in or to said lands

From the aforesaid judgment by the District Court of Murray County, Oklahoma, an appeal was prosecuted by the respondents to the Supreme Court of the State

of Oklahoma, and on the 14th day of July, 1925, the said Supreme Court of the State of Oklahoma rendered a judgment in said cause reversing the said judgment of the District Court of Murray County, which said judgment by the Supreme Court of the State of Oklahoma is in favor of the respondents above named and against your petitioner, and which judgment, in effect, holds that the respondents are the owners of the lands hereinbefore mentioned and described, and that this petitioner has no right, title or interest in or to the same.

Your petitioner further shows that after the rendition of said judgment by the Supreme Court of Oklahoma, and, to wit: On the 27th day of July, 1925, your petitioner filed a petition for rehearing, and that thereafter on the 12th day of January, 1926, an order was made by said Supreme Court of Oklahoma denying said petition for rehearing, and thereupon an opinion was filed in this cause by said court disaffirming and reversing the judgment of the District Court of Murray County, State of Oklahoma, which opinion is a part of the record in this cause.

Your petitioner further contends that in the rendition of its judgment aforesaid, and in its proceedings therein, the Supreme Court of Oklahoma committed certain errors to the prejudice of the rights of your peti-

tioner involving Federal questions, all of which will more in detail appear in the specific assignments of error hereinafter set out in this petition.

Your petitioner further respectfully shows to the Court that the said Supreme Court of the State of Oklahoma is the highest court of said state in which a decision in said cause could be had, and that the errors committed by the said Supreme Court of Oklahoma, and complained of by your petitioner are such as to entitle your petitioner to have the said cause removed to, and reviewed by, the Supreme Court of the United States by writ of certiorari, under the statutes of the United States authorizing the review of the decisions of the highest courts of the state by the Supreme Court of the United States, and that the Supreme Court of Oklahoma has entered its order in said cause staying the mandate of said court pending the hearing of this petition.

Wherefore, your petitioner, U. Sherman Joines, respectfully presents to this Court this, his petition, for writ of certiorari addressed to the Supreme Court of the State of Oklahoma, and commanding said court and the clerk thereof to certify to this Court the record and proceedings of the case in said court wherein your petitioner was respondent, and the respondents, William M. Patterson, Doroth A. McFarland, nee Patterson, Shelby A. Patterson, Howell M. Patterson, J. Allen Patterson and

Ruby E. Patterson, were appellants, together with the opinion of said court therein, for the purpose of review and determination of said cause by this Court.

For grounds for the issuance of said writ, your petitioner alleges that the Supreme Court of Oklahoma has, by its opinion in this case, decided Federal questions of substance not heretofore decided by the Supreme Court of the United States, or if so decided, not in accord with the applicable decisions of said court; these questions are more specifically pointed out in the following paragraphs from one to eleven, inclusive:

(1). The opinion of the Supreme Court of the State of Oklahoma *shows on its face* that the judgment of said court in favor of the respondents and against this petitioner is predicated and based upon the consideration of Federal questions, and the construction of Federal statutes and the laws of the State of Arkansas extended in force by Federal statutes in Indian Territory prior to the admission of said territory into the Union as a part of the State of Oklahoma, and the provisions of the Federal statute, known as the Enabling Act, under which Oklahoma was admitted as a state of the Union, and the provisions of the Oklahoma constitution, adopted pursuant to and accepting the provisions of said Enabling Act, and that the Federal statutes, questions and enact-

ments so considered and construed by the Supreme Court of the State of Oklahoma are decisive of the issues in this case, and without considering which the Supreme Court of Oklahoma could not have arrived at its judgment herein.

(2). The Supreme Court of Oklahoma misinterpreted Chapters 20 and 49 of Mansfield's Digest of the laws of the State of Arkansas, extended in force by Federal statute enacted May 2, 1890 (26 Statutes 81), in Indian Territory prior to the admission of Oklahoma as a state, in holding that under the provisions of said chapters the respondent, William M. Patterson, a non-citizen white man, took an estate by curtesy in the allotted lands of his deceased wife, a one-eighth blood Mississippi Choctaw Indian, selected and filed by him under Federal Indian allotment laws as her administrator after her death, and prior to the admission of Oklahoma as a state.

(3). The Supreme Court of Oklahoma misconstrued the provisions of the Federal statute enacted May 2, 1890 (26 Stat. 81), extending in force in Indian Territory certain of the laws of the State of Arkansas, and particularly Chapters 20 and 49 of Mansfield's Digest of said laws, and the provisions of the Federal statute known as the Choctaw-Chickasaw Supplemental Agree-

ment, adopted July ., 1902 (32 Stat. 641), and particularly Section 22 of said act, in holding that under the provisions of said acts the respondent, William M. Patterson, a non-citizen white man, took an estate by curtesy in the lands of his deceased wife, a one-eighth blood Mississippi Choctaw Indian, whose allotment was selected and filed by him after the death of his wife as her administrator, and prior to the admission of Oklahoma as a state.

(4). The Supreme Court of Oklahoma misinterpreted the provisions of the Federal statute adopted May 2, 1890 (26 Stat. 81), and the provisions of Chapter 97 of Mansfield's Digest of the laws of Arkansas, extended in force in Indian Territory by said statute, as construed by the Supreme Court of Arkansas, prior to such extension, in *Ferguson* v. *Peden*, 33 Ark. Rep. 150; *Jacks* v. *Chafin et al.*, 34 Ark. Rep. 534, and *Logan et al.* v. *Jelks*, 34 Ark. Rep. 547, and the provisions of the Federal statute, known as the Enabling Act, under which Oklahoma was admitted as a state (34 Stat. 267), in holding that the Arkansas Statute of Limitations extended in force in Indian Territory as aforesaid did not operate to bar the respondent, William M. Patterson's right of action as against this petitioner, if he ever had such right.

(5). That the Supreme Court of Oklahoma misconstrued the provisions of the Federal statute of May 2, 1890 (26 Stat. 81), and the provisions of Chapter 73 of Mansfield's Digest of the Laws of Arkansas, as extended in force in Indian Territory by the Federal enactment aforesaid, and particularly Sections 3509, 3510 and 3511 of said digest, as construed by the Supreme Court of Arkansas prior to such extension, in *Reid et al. v. Hart*, 45 Ark. Rep. 41, and the provisions of the Federal statute, known as the Enabling Act (34 Stat. 267), under which Oklahoma was admitted as a state, and particularly Sections 19 and 20 of said Enabling Act, and the provisions of the Constitution of Oklahoma, adopted pursuant to said Enabling Act, and particularly the provisions of Sections 1, 2, and 23 of the Schedule to said Constitution, in holding that the County Court of Carter County, Oklahoma, did not succeed to the jurisdiction of the United States Court for the Southern District of Indian Territory to confirm the sale by guardian, made under the orders of said United States Court to this petitioner of the lands of the respondents herein, aside from William M. Patterson, prior to the admission of Oklahoma as a state, but not confirmed until after statehood, and in holding that the order of confirmation of said sale entered by the County Court of Carter County, Oklahoma, after statehood was without jurisdiction and a nullity.

(6). That the Supreme Court of Oklahoma misconstrued the provisions of the Federal statute of May 2, 1890 (26 Stat. 81), and the provisions of Chapter 73 of Mansfield's Digest of the laws of Arkansas, and particularly Sections 3509, 3510 and 3511 of said digest, as extended in force in Indian Territory by the Federal enactment aforesaid, and as construed by the Supreme Court of Arkansas, prior to such extension, in the case of *Read et al. v. Hart*, 45 Ark. Rep. 41, and the provisions of the Federal statute, known as the Enabling Act (34 Stat. 267), under which Oklahoma was admitted as a state, and particularly Sections 19 and 20 of said Enabling Act, and the provisions of the Constitution of Oklahoma, adopted pursuant to said Enabling Act, and particularly the provisions of Section 1, 2 and 23 of the Schedule to said Constitution, in holding that the County Court of Bryan County, Oklahoma, alone succeeded to the jurisdiction of the United States Court for the Southern District of Indian Territory to confirm the sale by guardian to this petitioner of the lands involved herein, made by William M. Patterson as guardian of all the other respondents herein, under the orders of the United States Court for the Southern District of Indian Territory, and in further holding that the jurisdiction of the said County Court of Bryan County, Oklahoma, was exclusive of the jurisdiction of the county court of every

other county, and particularly of the County Court of Carter County, to confirm such sale.

(7). That the Supreme Court of Oklahoma misinterpreted the provisions of the Enabling Act providing for the admission of Oklahoma as a state (34 Stat. 267), and particularly the provisions of Sections 19 and 20 of said act providing for the transfer of causes pending in the United States courts of Indian Territory at the time of the admission of the State of Oklahoma, and the provisions of the Constitution of the State of Oklahoma, adopted pursuant to said Enabling Act, and particularly the provisions of Sections 1, 2 and 23 of the Schedule to the Constitution, in holding that by the provisions of said acts the guardianship proceeding for the sale of the lands of the respondents herein, other than William M. Patterson, which was pending in the United States Court for the Southern District of Indian Territory at the time of the admission of Oklahoma as a state, was transferred to the County Court of Bryan County, Oklahoma, and in not holding that said proceeding was transferred by the provisions of said acts to the County Court of Carter County, Oklahoma.

(8). That the Supreme Court of Oklahoma misinterpreted the provisions of the Federal enactment, known as the Enabling Act (34 Stat. 267), under which Okla-

homa was admitted as a state, and particularly Sections 19 and 20 thereof, and the provisions of the Constitution of the State of Oklahoma, adopted pursuant to, and in accepting the provisions of said Enabling Act, and particularly Sections 1, 2 and 23 of the Schedule to said Constitution, and the provisions of the Federal statute, adopted May 2, 1890 (26 Stat. 81), and the provisions of Chapter 73 of Mansfield's Digest of the laws of Arkansas, extended in force in Indian Territory by the Federal enactment last mentioned, in holding that an order confirming the sale by guardian of the lands of the respondents herein, other than William M. Patterson, to this petitioner made under the orders of the United States Court for the Southern District of Indian Territory, must have been confirmed within one year from the date of such sale, and in further holding that the sale would take the date of the order of confirmation instead of the order of confirmation relating back and taking the date of the sale.

(9). The Supreme Court of Oklahoma misinterpreted the provisions of the Federal act of May 2, 1890 (26 Stat. 81), extending in force in Indian Territory Chapter 73 of Mansfield's Digest of the laws of Arkansas, and particularly misinterpreted the provisions of Sections 3509, 3510 and 3511 of said digest, as construed by the Supreme Court of Arkansas prior to the extension

of said chapter to Indian Territory, in the case of *Reed et al.* v. *Hart*, 45 Ark. Rep. 41, in not holding that the United States Court for the Southern District of Indian Territory, being the district in which the lands sought to be sold and involved herein were situated, had exclusive jurisdiction to order and confirm the sale by guardian to this petitioner of the lands of the respondents, other than William M. Patterson, and in not holding that with the coming of statehood the jurisdiction to confirm said sale was by the provisions of the Federal statute, known as the Enabling Act (34 Stat. 267), and particularly Sections 19 and 20 of said act, and the provisions of the Consitution of Oklahoma, adopted pursuant to said act, and particularly Sections 1, 2 and 23 of the Schedule to said Constitution, transferred to the County Court of Carter County, Oklahoma, as its successor in jurisdiction, to complete by confirmation the sale previously had in the said Federal Court by the Southern District.

(10) When by Act of May 2, 1890 (26 Stat. 81), Congress extended in force in Indian Territory the provisions of Chapters 73 and 97 of Mansfield's Digest they carried with them the prior constructions of said statutes by the Supreme Court of the State of Arkansas, and such constructions had the force of Federal law, and the constructions necessarily placed upon said chapters by the Supreme Court of Oklahoma in this case are in con-

flict with said prior constructions thereof by the Supreme Court of Arkansas in the case of *Reid et al.* v. *Hart*, 45 Ark. Rep. 41, and in the cases of *Ferguson* v. *Peden*, 33 Ark. Rep. 150; *Jacks* v. *Chafin et al.*, 34 Ark. Rep. 534, and *Logan et al.* v. *Jelks*, 34 Ark. Rep. 547.

(11). The Supreme Court of Oklahoma misconstrued the provisions of the Federal statute of May 2, 1890 (26 Stat. 81), and of Chapters 20 and 49 of Mansfield's Digest of the laws of Arkansas, extended in force in Indian Territory by the Federal act aforesaid, in holding that William M. Patterson took a life estate by curtesy in the lands of Emma Patterson, and further misconstrued the provisions of Chapter 97 of Mansfield's Digest of the laws of Arkansas, extended in force in Indian Territory by the Federal act aforesaid, in holding that the Arkansas Statute of Limitations, plead by this petitioner as a defense in this action, did not operate to terminate such life estate, if he did take one, and by reason of such misinterpretation of said statutes it reached the conclusion that there was outstanding in the said William M. Patterson an intervening life estate, which prevented the running of the Oklahoma Statute of Limitations as against the respondents, Doroth A. Patterson and Shelby A. Patterson, who attained full age more than two years prior to the filing of this suit in the trial court, and against whom the Oklahoma Statute of Limitations was plead as a defense.

In this behalf your petitioner states the following additional facts:

(a). The lands involved in this action were a portion of the tribal lands of the Choctaw-Chickasaw Tribes of Indians.

(b). Emma Patterson was a one-eighth blood Mississippi Choctaw Indian; she was the wife of William M. Patterson, one of the respondents herein, and the mother of all of the other respondents herein; she was entitled to an allotment in the tribal lands of said tribes of Indians, but died on the 14th day of May, 1906, in what was then the Central District of Indian Territory, without having selected her allotment.

(c). William M. Patterson, the husband of Emma Patterson and the father of all of the other respondents herein, was a non-citizen white man, and immediately after the death of Emma Patterson he, as her administrator, selected and filed in her name and as her allotment the lands involved in this action.

(d). At the time of the death of Emma Patterson, and at the time of the purchase by the petitioner of the lands involved herein, the respondents, Doroth A. Patterson, Shelby A. Patterson, Howell M. Patterson, J. Allen Patterson and Ruby E. Patterson, were minors, and prior to the purchase of said lands by this petitioner,

their father, William M. Patterson, was appointed as the guardian of their persons and estates by the United States Court for the *Central District* of Indian Territory, sitting at Durant in what after statehood became Bryan County, Oklahoma, being the district in which they then resided, and was at the time of said sale the duly and legally qualified and acting guardian for all of said respondents.

(e). The lands involved in this suit were all situated in what was then the *Southern District* of Indian Territory, and on the 24th day of April, 1907, before statehood, William M. Patterson, as guardian for his minor children, being all of the other respondents herein, filed in the United States Court for the said *Southern District* of Indian Territory, sitting at Ardmore, in what after statehood became Carter County, Oklahoma, his petition to sell the lands involved herein, which petition was granted and an order of sale was entered by said United States Court for the Southern District of Indian Territory.

(f). Thereafter the said William M. Patterson, pursuant to said order, caused said lands to be duly appraised and advertised for sale, and sold said lands to the petitioner, U. Sherman Joines, on the 5th day of October, 1907, he executed a deed for said lands to U.

Sherman Joines, and on the 8th day of October, 1907, filed in the said United States Court for the Southern District of Oklahoma a full and complete report of sale, showing the sale of said lands under said order of said court to U. Sherman Joines; further showing that he had received from the said Joines the full consideration therefor; that he had executed a deed for said lands, and requested that an order of confirmation be entered by said court.

(g). U. Sherman Joines took possession of said lands on the 5th day of October, 1907, before statehood, and has been in open adverse possession ever since; he had been in such for more than twelve years prior to the filing of this suit in the trial court.

(h). Prior to statehood the guardianship files pertaining to the *appointment* of William M. Patterson as guardian were in the *United States Court for the Central District of Indian Territory*, sitting at Durant, and with the coming of statehood were transferred *to the County Court of Bryan County, Oklahoma*, prior to statehood all of the guardianship proceedings *pertaining to the sale of the lands by* William M. Patterson, as guardian of his minor children, being all of the other respondents herein, *were on file in the United States Court for the Southern District of Indian Territory*, being the district in which the lands were located, and

these papers were never at any time on file in the United States Court for the Central District of Indian Territory. With the coming of statehood these papers from the United States Court of the Southern District *were transferred to the County Court of Carter County, Oklahoma, sitting at Ardmore.*

(f). After statehood, and, to wit: On the 14th day of July, 1913, and before any proceedings were had to remove these papers from the County Court of Carter County, Oklahoma, said county court entered its order confirming the guardianship sale made prior to statehood under the orders of the United States Court for the Southern District of Indian Territory. This confirmation being made under the report of sale and petition for confirmation filed in the Federal Court for the Southern District of Indian Territory prior to the transfer of said papers to the County Court of Carter County, but which, through oversight, had not been acted upon at an earlier date.

(g). On the 5th day of August, 1913, William M. Patterson executed a second guardian's deed in favor of this petitioner to the lands involved herein.

(h). The petitioner, U. Sherman Joines, remained in undisputed possession of said lands until the filing of this suit on February 21st, 1929, nearly thirteen years

after the purchase of said lands, and still is in possession of same.

(l). No fraud is alleged or claimed to have been perpetrated; the suit on the part of the respondents is predicated on the theory that William M. Patterson is, and has always been, the owner of a life estate in said lands, and that the other respondents are still the owners of the fee simple title to said lands on the theory that the United States Court for the Southern District of Indian Territory did not have jurisdiction to order the sale, and the County Court of Carter County did not have jurisdiction to confirm said sale, and that therefore the guardian's deed to this petitioner is void and conveys no title.

(m). The defense of this petitioner to said action is based on the fact that the guardianship deed is valid and conveys title to this petitioner, which draws in issue the jurisdiction of the United States Court for the Southern District of Indian Territory, in which the lands were situated, to order the sale; which further draws in issue the question of what court inherited the jurisdiction to confirm, after statehood, the sale previously made under the orders of said Federal Court for the Southern District, but not confirmed before the intervention of statehood, and which further draws in issue the effect of

the order of confirmation made by the County Court of Carter County, Oklahoma, confirming said sale.

(n). As a further defense this petitioner raises the issue that William M. Patterson took no life estate by curtesy in the lands of his deceased wife; the further issue that if he did take such an estate his right to assert it is barred by the Arkansas Statute of Limitations; and the further defense that he is estopped by his own conduct in selling said lands as the lands of his minor children without asserting an interest therein, to now assert such right as against this petitioner.

(o). As a further defense this petitioner pleads the Oklahoma Statute of Limitations as against the respondents, Doroth A. Patterson and Shelby A. Patterson, who attained full age more then two years before the filing of this suit.

(p). As previously stated, the trial court resolved the issues herein in favor of this petitioner; the case was appealed to the Supreme Court of Oklahoma, where it was first affirmed, but later reversed and the issues decided against this petitioner.

(q). The opinion of the Supreme Court of Oklahoma deciding the issues against this petitioner shows on its face that all of the Federal questions set out in the errors hereinbefore complained of have necessarily been passed upon adversely to this petitioner, and reference is hereby specifically made to said petition set out in the

transcript filed herewith, from which it will be seen that these Federal questions have been considered and passed upon by said court, and that jurisdiction is thereby conferred upon the Supreme Court of the United States to review said decision.

(r). Your petitioner, in the brief accompanying this petition, will more particularly elaborate upon the foregoing questions.

(s). Your petitioner further presents herewith a certified copy of the entire record in this cause, including the proceedings in the Supreme Court of the State of Oklahoma, and the opinion of said court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of the State of Oklahoma, sitting at Oklahoma City, Oklahoma, commanding the said court to certify and to send to this Court on a day to be designated a full and complete transcript of the record and all proceedings of the said Supreme Court of the State of Oklahoma, had in said cause, to the end that said cause may be reviewed and determined by this Honorable Court as provided by law, and that the said judgment of the Supreme Court of the State of Oklahoma be reversed by this Honorable Court, and for such other relief as may seem proper, and your petitioner will ever pray.

Wm. G. Davisson,
Ardmore, Oklahoma,
Counsel for Petitioner.

State of Oklahoma, County of Carter, ss.

Wm. G. Davisson, being first duly sworn, on oath deposes and says that he is the counsel for petitioner, U. Sherman Joines; that he has read the foregoing petition and knows the contents thereof; that he has also read a duly certified copy of the Transcript of Record, which accompanies the petition herein, being the Transcript of Record in the case at bar; that the matters in said petition are, in the judgment of this affiant, duly supported in and by said Transcript of Record; that he knows of the above proceedings had, and that the acts and things in said petition stated are, to the best of his knowledge and belief, true.

Affiant further says that in his opinion the petition is well founded, and that the case is one in which the prayer of the petition should be granted by this Court.

Wm. G. Davisson.

Subscribed and sworn to before me this the 5th day of February, 1926.

(Seal) L. M. Dies, Notary Public.

My commission expires Oct. 16th, 1929.

Supreme Court of the United States

U. SHERMAN JOINES, PETITIONER,

vs.

WILLIAM M. PATTERSON, DOROTH A. McFARLAND, NEE PATTERON, SHELBY A. PATTERSON, AND HOWELL M. PATTERSON, J. ALLEN PATTERSON AND RUBY E. PATTERSON, MINORS, BY THEIR NEXT FRIEND, WILLIAM M. PATTERSON, RESPONDENTS.

BRIEF ON BEHALF OF PETITIONER IN SUPPORT OF PETITION FOR REVIEW BY THE SUPREME COURT OF THE UNITED STATES.

STATEMENT OF FACTS.

This brief is filed in support of a petition for review by the Supreme Court of the United States by way of certiorari, of the final judgment and decision of the Supreme Court of the State of Oklahoma in the above cause, in which decision and final judgment by said court the issues involved were decided against this petitioner and in favor of the respondents.

This action was originally filed in the District Court of Murray County, Oklahoma, by Wm. M. Patterson, Doroth A. McFarland, nee Patterson, Shelby A. Patterson, and Howell M. Patterson, J. Allen Patterson and

Ruby E. Patterson, being the respondents herein, against U. Sherman Joines, your petitioner.

The purpose of this suit was to recover from your petitioner certain lands situated in Murray County, Oklahoma.

The petition in said trial court is set out in the transcript filed herewith (Trans. 5-7). It is alleged in this petition that the lands involved in this action were the allotment of one Emma Patterson, a Mississippi Choctaw Indian of one-eighth blood; that said Emma Patterson died intestate in what is now Bryan County, Oklahoma, in the year 1906; that the respondent William M. Patterson was the husband of the said Emma Patterson, and that the other respondents herein were the children of the said Emma Patterson and William M. Patterson; by reason of which relationship William M. Patterson claims a life estate by curtesy under the Arkansas laws in force in Indian Territory prior to statehood, and the other respondents claim the fee simple title, subject to said life estate, to the lands involved herein, all claiming as the heirs of Emma Patterson, deceased.

By said petition it is further alleged that your petitioner, U. Sherman Joines, has been in adverse possession of all of said lands, using and occupying the same, since July 5th, 1907.

Respondents further ask that they be adjudged to be the sole owners of the lands involved, and that your petitioner be adjudged to have no right, title or interest therein.

By way of defense to this action, your petitioner, by his answer filed in the trial court (Transcript 11), and by his amended answer (Transcript 39), admits that he has been in undisputed possession, claiming the ownership of said lands at all times since the month of October, 1907. He admits that the lands in question were allotted to Emma Patterson; that she was a one-eighth blood Mississippi Choctaw Indian; that she died intestate in what was then the Central District of Indian Territory, on or about the 14th day of May, 1906; that at the time of her death she left surviving her William M. Patterson, her husband, and Doroth A. Patterson, Shelby A. Patterson, Howell M. Patterson, J. Allen Patterson and Ruby E. Patterson, her children.

Your petitioner, by said answer, denies, however, that William M. Patterson was an heir of his wife, Emma Patterson, or that he took a life estate in said lands.

Your petitioner admits that the other respondents above named were the heirs of the said Emma Patterson, and that they inherited from her the lands involved in this action.

It is further contended and alleged in said answer that Emma Patterson died before selecting her allotment as a member of the Choctaw Chickasaw Tribes of Indians, and that said allotment was selected and filed by her husband, William M. Patterson, as administrator of her estate after her death.

It is further alleged in said answer that William M. Patterson was the duly and legally appointed guardian of all of the children of Emma Patterson, aforesaid; that said children were minors, and that as such guardian, the said William M. Patterson, by due and legal probate proceedings duly and regularly had, sold and conveyed the lands herein to your petitioner on or about the 5th day of October, 1907, and that thereafter and on or about the 5th day of August, 1913, still acting as such guardian, the said William M. Patterson made a second deed to your petitioner, both of which are attached to said answer as exhibits and set out (Transcript 14).

Your petitioner further alleges that said conveyances by said guardian were duly and regularly ordered and approved by the probate court having jurisdiction of said guardianship sale, and attaches to his answer the petition for sale, order of sale and report of sale made and filed in the Southern District of Indian Territory, where the lands were located (Transcript 25-36, inc.), and the confirmation of sale made by the County Court of Carter County, Oklahoma (Transcript 36-38).

As a further defense to said action, your petitioner by said answer especially pleads that the respondent, William M. Patterson, is estopped by his conduct in holding out said lands and selling them to this petitioner as the lands of his minor children to now assert a life estate therein.

He further especially pleads that if the said respondent, William M. Patterson, ever had any right to a life estate in said lands that it is barred by the Arkansas Statute of Limitations in force at the time when this petitioner went into open adverse possession of said lands.

It is further alleged in said answer that the respondent, William M. Patterson, is a white man; that he was not enrolled as a member of either of the Five Civilized Tribes of Indians; that he was not a citizen of said tribes, and that he was not entitled to any interest in the lands of his deceased wife, either by way of curtesy or as an heir.

It is further alleged in said answer that as to the other respondents, aside from William M. Patterson, their right of action is barred by the Oklahoma Statute of Limitations, which is especially plead as a defense.

It is further alleged that the action itself constitutes a collateral attack on the orders and judgment of the

probate court under which said lands were sold to this petitioner.

By way of reply to the answer of this petitioner (Transcript 23), the respondents especially deny that the United States Court for the Southern District of Indian Territory had jurisdiction to order the sale of the lands of the respondents herein to your petitioner, but admit that in the month of April, 1907, the said William M. Patterson, as guardian of all of the other respondents, filed his petition in the United States Court for the Southern District of Indian Territory, sitting at Ardmore, for the sale of the lands involved in this action; that thereafter, on the 2nd day of May, said petition was heard by said court and said lands were ordered to be sold by said guardian; that thereafter, on the 8th day of October, 1907, the said guardian filed in said court a report of the sale of said lands and that thereafter, and on the 14th day of July, 1913, the County Court of Carter County, State of Oklahoma, entered its order attempting to confirm the sale of said real estate to this petitioner, U. Sherman Joines, but in said reply the respondents contend that all of said orders and proceedings are void, for the reason that the United States Court for the Southern District of Indian Territory was without authority of law to sell the lands belonging to said minors.

By their reply aforesaid, they further contend that the order of confirmation entered by the County Court of Carter County on the 14th day of July, 1913, is void, but do not state on what ground. In said reply it is further alleged that the Arkansas Statute of Limitations does not operate to bar the right of action, as contended by your petitioner.

This case was submitted to the trial court, being the District Court of Murray County, Oklahoma, on the following agreed statement of facts (Transcript 66-70):

"It is hereby agreed by and between the above named plaintiffs by their attorneys, Hayes & McIntosh and the defendant, U. S. Jones, by his attorney, Wm. G. Davisson:

"1. That the following described lands and premises were allotted to Emma Patterson, a Mississippi Choctaw of the one-fourth blood, to wit:

"E½ of the NE¼ and the E½ of the W½ of the NE¼ and NW¼ of SW¼ of NE¼ and W½ of NW¼ of N. E. ¼, and the N. ½ of N. W. ¼ and the N. E. ¼ of S. E. ¼ of Section 31, Township 1 South, Range 1 West, and also the W. ½ of N. W. ¼ of S. E. ¼ of Section 8, Township 2 South, Range 1 West, containing 280 acres, more or less, according to the United States Survey thereof, located and situated in Murray County, State of Oklahoma,

and

The W. ½ of the N. E. ¼ of the N. E. ¼ of Section 27, Township 2 South, Range 6 West, containing 20 acres, more or less, according to the United States Survey

thereof, located and situated in Stephens County, State of Oklahoma,

and

The N. ½ of the N. W. ¼ of the N. E. ¼ and the S. W. ¼ of the N. W. ¼ of N. E. ¼ and the S. E. ¼ of S. E. ¼ of Section 12, Township 2 South, Range 2 West of the Indian Base Meridian, located and situated in Carter County, State of Oklahoma, containing 70 acres, more or less, according to the United States Survey thereof.

"2. That the said Emma Patterson died intestate on or about the 14th day of May, 1906, in what was then the Central District of Indian Territory, and that at the time of her death she left surviving her her husband, W. M. Patterson, and her children, to wit: Doroth A. Patterson, female; Shelby A. Patterson, male; Howell M. Patterson, male; J. Allen Patterson, male, and Ruby E. Patterson, female, which said children were born to the said W. M. Patterson and Emma Patterson in lawful wedlock.

"3. That the lands hereinabove described were filed on and allotted to the said Emma Patterson after her death by the said W. M. Patterson, her husband, as administrator of her estate.

"4. That W. M. Patterson, the husband of said Emma Patterson, was a white person and not on the tribal rolls and not a citizen, and that the said Doroth A. Patterson, Shelby A. Patterson, Howell M. Patterson, J. Allen Patterson and Ruby E. Patterson were Mississippi Choctaw of the one-eighth blood.

"5. That the children of the said Emma Patterson, plaintiffs herein, were born on the following dates, to wit:

"Doroth A. McFarland, nee Patterson, 9, March 25, 1894.

"Shelby A. Patterson, 6, March 25, 1897.

"Howell M. Patterson, 3, March 25, 1900.

"J. Allen Patterson, May 30, 1903.

"Ruby E. Patterson, September 9, 1905.

And on this the 20th day of December, 1920, are of the following ages, to wit:

"Doroth A. McFarland, nee Patterson, 26 years, 8 months and 25 days.

"Shelby A. Patterson, 23 years, 8 months and 25 days.

"Howell M. Patterson, 20 years, 8 months and 25 days.

"J. Allen Patterson, 17 years, 6 months and 20 days.

"Ruby E. Patterson, 15 years, 3 months and 11 days.

"6. That on the 24th day of April, 1907, W. M. Patterson, as the duly qualified and acting guardian of the persons and estates of the above named minors, filed in the United States Court for the Southern District of the Indian Territory at Ardmore, his petition for the sale of the above described lands, a copy of which petition is hereto attached, made a part hereof and marked Exhibit 'A'; that on the 2nd day of May, 1907, the United States Court, sitting at Ardmore, Indian Territory, entered its order authorizing said guardian to sell said land, a copy of said order is hereto attached, made a part hereof and marked Exhibit 'B'.

"7. That on the 8th day of October, 1907, the said W. M. Patterson, as guardian of said minors, filed in the United States District Court at Ardmore, Oklahoma, his report of sale, a copy of which report of sale is hereto attached, made a part hereof and marked Exhibit 'C'.

"8. That on the 14th day of July, 1913, the County Court of Carter County, State of Oklahoma, entered its order confirming sale of said real estate by said guardian, a copy of which order of confirmation is hereto attached, made a part hereof and marked Exhibit 'D'.

"9. That on the 5th day of August, 1913, W. M. Patterson, as the guardian of said minors, executed a guardian's deed to said lands to said defendant, a copy of which guardian's deed is hereto attached, made a part hereof and marked Exhibit 'E'.

"10. That W. M. Patterson, above named, was appointed guardian of the above named Doroth A. Patterson on December 7, 1904, at Durant in the Central District of the Indian Territory; that the said W. M. Patterson was appointed guardian of Shelby A. Patterson and Howell M. Patterson, above named, on the 19th day of September, 1904, at Durant, in the Central District of the Indian Territory; that the said W. M. Patterson was appointed guardian of J. Allen Patterson and Ruby E. Patterson, above named, on the 22nd day of April, 1907, in the United States District Court of the Central District of Indian Territory at Durant, Oklahoma; that the guardianship of the above named minors was never at any time pending in the Southern District of the Indian Territory or in Carter County, Oklahoma, except in the matter of the sale of said property as herein agreed and shown.

"11. That on the 5th day of October, 1907, W. M. Patterson, as the guardian of said minors, executed a guardian's deed to the said defendant herein, copy of said deed is hereto attached, made a part hereof and marked Exhibit 'F'; that the only order confirming the sale of said lands which was ever made is that shown as Exhibit 'D' to this stipulation.

"12. That the said U. S. Joines took possession of said lands and premises above described and has been

in the peaceful possession of same from on or about the 5th day of October, 1907, until the present time, and is now in the possession of said lands.

"13. That the said W. M. Patterson, husband of said Emma Patterson and father of said above named children, has never at any time executed to U. S. Joines or any other person any deed whatsoever to his individual interest, if any, in and to said lands, and that no adult heirs joined in said sale.

"14. That appraisers were appointed, appraisement was had, bonds were filed, notices were given and sale was held, reports were filed, deeds were executed and confirmation was had at the times, places and in the manner in the orders, reports, deeds and judgment, attached hereto as exhibits, ordered set forth and recited."

The exhibits referred to in the agreed statement of facts, appear in the transcript filed herewith on the following pages:

Exhibit "A", petition of William M. Patterson, guardian, to sell lands involved herein, filed in the Southern District of Indian Territory (Transcript 70).

Exhibit "B", order of the United States Court for the Southern District of Indian Territory, authorizing guardian to sell lands (Transcript 75).

Exhibit "C", report of sale by guardian, filed in United States Court for Southern District of Indian Territory, at Ardmore, Oklahoma (Transcript 78).

Exhibit "D", order of county court confirming sale of real estate by guardian (Transcript 81).

Exhibit "E", guardian's deed by William M. Patterson in favor of U. Sherman Joines (Transcript 83).

Exhibit "F", guardian's deed by William M. Patterson in favor of U. Sherman Joines (Transcript 84).

The judgment of the trial court was in favor of your petitioner and against the respondent (Transcript 95). In its conclusions of law, the trial court finds that any life estate which William M. Patterson may have taken in said lands is barred by the Arkansas Statute of Limitations in force in Indian Territory prior to statehood, and at the time when your petitioner went into possession of said lands.

It further finds that the said William M. Patterson is estopped by his own conduct in selling the lands as the lands of his wards and placing your petitioner in possession thereof to assert an estate by curtesy in himself.

It further finds that the United States Court for the Southern District of Indian Territory had jurisdiction to authorize the guardian's sale by William M. Patterson, as guardian of the other respondents herein; and that the County Court of Carter County, Oklahoma, had

jurisdiction to confirm said sale so authorized by the United States Court, and that respondents cannot attack said sale collaterally.

It further finds that the minor heirs were authorized to sell said lands through their guardian without joining any adult heirs, there being no adult heirs at the time.

And, lastly, it finds that Doroth A. Patterson and Shelby A. Patterson are barred by the Oklahoma Statute of Limitations, pleaded as a defense in said cause, to assert title to said lands; and resolves all issues in favor of your petitioner.

From the judgment of the trial court an appeal was prosecuted by the respondents to the Supreme Court of the State of Oklahoma, which resulted, first, in the affirmation of judgment of the trial court (Trans. 116). A rehearing was denied by the Supreme Court of Oklahoma, but a second application therefor was granted, and on the rehearing thereof the judgment of the trial court and the former judgment of the Supreme Court were reversed and all of the issues were by said judgment resolved in favor of the respondents and against your petitioner. This last opinion of the court, which is the final judgment appealed from, appears in the Transcript at pages 132).

The final judgment of the Supreme Court of Oklahoma, above referred to, was rendered on the 14th day of July, 1925. On the 27th day of July, 1925, your petitioner filed an application for rehearing, which application appears in the Transcript at pages 143-151.

On the 12th day of January, 1926, an order was made by the Supreme Court of Oklahoma denying said petition for rehearing (Transcript 153); whereupon your petitioner filed in said court his petition for stay of mandate (Transcript 153), pending the reviewing of this cause by the Supreme Court of the United States; and on the hearing thereof the Supreme Court of Oklahoma entered its order staying the mandate in said cause, pending such review (Transcript 155-156).

Final Opinion and Judgment of the Supreme Court of Oklahoma.

It will be seen by reference to the final opinion and judgment of the Supreme Court of the State of Oklahoma, which it is sought by this proceeding to have reviewed, as well as from an inspection of the judgment of the trial court, that the decisions of both courts are based upon Federal questions, and that without considering such Federal questions said courts could not have arrived at the conclusions rendered.

The opinion arrived at herein could not have been

reached without determining the Federal question of whether or not the United States Court for the Southern District of Indian Territory, being the district in which the lands sought to be sold were located, had jurisdiction to order and confirm the sale of said lands under the provisions of the laws of the State of Arkansas, as extended in force by Federal enactment in Indian Territory.

Said decision could not have been arrived at without determining whether the County Court of Carter County, sitting at Ardmore, Oklahoma, or the County Court of Bryan County, sitting at Durant, Oklahoma, inherited the jurisdiction of the Federal Court to confirm such sale, statehood having intervened after the sale of the said lands under the orders of the Federal Court, but before the confirmation thereof; and this necessitates the construction of the Federal Enabling Act and the provisions of the Constitution of the State of Oklahoma accepting said act and adopted pursuant thereto.

Said decision could not be arrived at without determining the Federal question as to whether or not under the provisions of the Federal enactments governing the allotment of Indian lands and the descent and distribution thereof, and the provisions of the Arkansas statutes, extended in forced in Indian Territory prior

to statehood, William M. Patterson, a non-citizen white man, would take an estate by curtesy in the lands of his deceased wife of Indian blood, who died in Indian Territory prior to statehood and prior to the selection of her allotment, and whose allotment was selected and filed by her husband, William M. Patterson, as her administrator.

Said opinion could not be arrived at without determining and construing the provisions of the Arkansas Statute of Limitations and the Federal statute, extending the said statute of limitations in force in Indian Territory, in order to determine whether or not the same operated to bar William M. Patterson from asserting such life estate, if as a matter of fact he had one.

Said opinion could not be arrived at without determining the Federal question as to whether or not, under the provisions of the Arkansas laws and the Federal statutes in force in Indian Territory prior to statehood, William M. Patterson took a life estate by curtesy, and, if so, the effect of the Arkansas Statute of Limitations in terminating such estate so that there would be no intervening life estate to prevent the running of the statute of limitations of Oklahoma as against the two minor respondents who had become of age more than two years prior to the filing of this suit.

All of these are Federal questions and the opinion of the Supreme Court of the State of Oklahoma, from which this appeal is prosecuted, discloses on its face that all of these issues were considered and passed upon by that court. That opinion on its face determines that William M. Patterson did have a life estate in said lands by virtue of the provisions of said Federal statutes and the laws of Arkansas extending in force in Indian Territory.

It determines that the Arkansas Statute of Limitations, extended in force by the Federal enactment in Indian Territory, did not run against the respondent, William M. Patterson, so as to operate as a bar to preclude him from setting up said life estate as against your petitioner.

It determines that by reason of the existence of said life estate, and by reason of the fact that the Arkansas statute did not operate as a bar to terminate such estate that there was an intervening life estate, which prevented the Oklahoma statute from running against the minors, Doroth A. Patterson and Shelby A. Patterson, who had attained full age two years prior to the filing of the same.

It determines the Federal question that under the said Federal statutes and the provisions of the laws of

Arkansas, in force in Indian Territory, the United States Court for the Southern District of Oklahoma did not have jurisdiction to order and confirm the sale by guardian of the lands involved herein.

It construes the Federal Enabling Act, by which Oklahoma was admitted as a state, and the provisions of the Oklahoma Constitution, accepting said Enabling Act, and determines that by said act the jurisdiction of the Federal courts to confirm said sale was not handed down to the County Court of Carter County, Oklahoma, but was handed down to the County Court of Bryan County, Oklahoma, to the exclusion of all other counties in the state.

It further determines on its face that the sale of lands herein had, under the orders of the United States Court for Indian Territory, pursuant to the provisions of the Federal statutes and the Arkansas laws extended in force in Indian Territory, must have been confirmed within one year from the date of sale, and that the date of sale would take the date of the order of confirmation instead of the order of confirmation relating back and taking effect as of the date of the sale.

The petition for rehearing filed in the Supreme Court of Oklahoma by your petitioner (Transcript 143) specifically points out to the Supreme Court of Okla-

homa its error in construing the provisions of Mansfield's Digest of the Laws of Arkansas in force in Indian Territory prior to statehood, and particularly Sections 3509, 3510 and 3511 thereof; the error of the court in misconstruing Sections 19 and 20 of the Enabling Act by which Oklahoma was admitted as a state; the error of the court in misconstruing Sections 1, 2 and 23 of the Schedule to the Constitution of Oklahoma; the error of the court in misconstruing the provisions of the Choctaw Chickasaw Supplemental Agreement (32 Stat. 641), and the provisions of Mansfield's Digest referred to therein; the error of the court in misconstruing the provisions of Chapter 97 of Mansfield's Digest, and particularly Sections 4471, 4474 and 4476 thereof, as extended and in force in Indian Territory by Federal enactment; and both in the original brief in this cause in the Supreme Court of Oklahoma and in the argument thereof to said court, in the brief in support of rehearing, and in the oral argument had on the petition for rehearing, all of the Federal questions set forth in the petition for writ of certiorari filed herewith were argued and presented to and considered by the said Supreme Court.

The petition for rehearing was denied, leaving in force the opinion and judgment of the Supreme Court set out at Transcript 132.

Errors Set Out in Petition for Certiorari.

The petition for writ of certiorari sets out eleven alleged errors by the Supreme Court of Oklahoma, and reasons for the review of this cause by the Supreme Court of the United States. These reasons are as follows:

"(1) The opinion of the Supreme Court of the State of Oklahoma shows on its face that the judgment of said court in favor of the respondents and against this petitioner is predicated and based upon the consideration of Federal questions, and the construction of Federal statutes and the laws of the State of Arkansas extended in force by Federal Statutes in Indian Territory prior to the admission of said territory into the Union as a part of the State of Oklahoma, and the provisions of the Federal Statute known as the Enabling Act under which Oklahoma was admitted as a state of the Union, and the provisions of the Oklahoma Constitution adopted pursuant to, and accepting the provisions of said Enabling Act, and that the Federal Statutes, questions and enactments so considered and construed by the Supreme Court of the State of Oklahoma are decisive of the issues in this case, and without considering which the Supreme Court of Oklahoma could not have arrived at its judgment herein.

"(2) The Supreme Court of Oklahoma misinterpreted Chapters 20 and 49 of Mansfield's Digest of the Laws of the State of Arkansas, extended in force by Federal Statute enacted May 2, 1890 (26 Stat. 81), in Indian Territory prior to the admission of Oklahoma as a State, in holding that under the provisions of said chapters the respondent, William M. Patterson, a non-citizen white man, took

an estate by curtesy in the allotted lands of his deceased wife, a one-eighth blood Mississippi Choctaw Indian, selected and filed by him under Federal Indian allotment laws as her administrator after her death, and prior to the admission of Oklahoma as a state.

"(3) The Supreme Court of Oklahoma misconstrued the provisions of the Federal Statute enacted May 2, 1890 (26 Stat. 81), extending in force in Indian Territory certain of the laws of the State of Arkansas, and particularly Chapters 20 and 49 of Mansfield's Digest of said laws, and the provisions of the Federal Statute known as the Choctaw-Chickasaw Supplemental Agreement, adopted July 1, 1902 (32 Stat. 641), and particularly Section 22 of said Act in holding that under the provisions of said acts the respondent, William M. Patterson, a non-citizen white man, took an estate by curtesy in the lands of his deceased wife, a one-eighth blood Mississippi Choctaw Indian, whose allotment was selected and filed by him after the death of his wife as her administrator, and prior to the admission of Oklahoma as a state.

"(4) The Supreme Court of Oklahoma misinterpreted the provisions of the Federal Statute adopted May 2, 1890 (26 Stat. 81), and the provisions of Chapter 97 of Mansfield's Digest of the Laws of Arkansas extended in force in Indian Territory by said statute, as construed by the Supreme Court of Arkansas prior to such extension in *Ferguson* v. *Peden*, 33 Ark. 150; *Jacks* v. *Chahn et al*., 34 Ark. Rep. 534, and *Loomis et al.* v. *Jelks*, 34 Ark. 547, and the provisions of the Federal Statute known as the Enabling Act under which Oklahoma was admitted as a state (34 Stat. 267), in holding that the Arkansas Statute of Limitations extended in force in Indian Territory as aforesaid did not operate to

bar the respondent, William M. Patterson's, right of action as against this petitioner, if he ever had such right.

"(5) That the Supreme Court of Oklahoma misconstrued the provisions of the Federal statute of May 2, 1890 (26 Stat. 81), and the provisions of Chapter 73 of Mansfield's Digest of the laws of Arkansas, as extended in force in Indian Territory by the Federal enactment aforesaid, and particularly Sections 3509, 3510 and 3511 of said digest as construed by the Supreme Court of Arkansas prior to such extension in *Reed et al. v. Hart*, 45 Ark. Rep. 41, and the provisions of the Federal statute, known as the Enabling Act (34 Stat. 267), under which Oklahoma was admitted as a state, and particularly Sections 19 and 20 of said Enabling Act, and the provisions of the Constitution of Oklahoma, adopted pursuant to said Enabling Act, and particularly the provisions of Sections 1, 2 and 23 of the Schedule to said Constitution, in holding that the County Court of Carter County, Oklahoma, did not succeed to the jurisdiction of the United States Court for the Southern District of Indian Territory to confirm the sale by guardian, made under the orders of said United States Court to this petitioner of the lands of the respondents herein, aside from William M. Patterson, prior to the admission of Oklahoma as a state, but not confirmed until after statehood; and in holding that the order of confirmation of said sale entered by the County Court of Carter County, Oklahoma, after statehood, was without jurisdiction and a nullity.

"(6) That the Supreme Court of Oklahoma misconstrued the provisions of the Federal statute of May 2, 1890 (26 Stat. 81), and the provisions of Chapter 73 of Mansfield's Digest of the laws of Arkansas, and particularly Sections 3509, 3510 and 3511

of said digest, as extended in force in Indian Territory by the Federal enactment aforesaid, and as construed by the Supreme Court of Arkansas prior to such extension in the case of *Reid et al. v. Hart*, 45 Ark. Rep. 41, and the provisions of the Federal statute, known as the Enabling Act (34 Stat. 267), under which Oklahoma was admitted as a state, and particularly Sections 19 and 20 of said Enabling Act, and the provisions of the Constitution of Oklahoma, adopted pursuant to said Enabling Act, and particularly the provisions of Sections 1, 2 and 23 of the Schedule to said Constitution, in holding that the County Court of Bryan County, Oklahoma, alone succeeded to the jurisdiction of the United States Court for the Southern District of Indian Territory to confirm the sale by guardian to this petitioner of the lands involved herein, made by William M. Patterson as guardian of all the other respondents herein, under the orders of the United States Court for the Southern District of Indian Territory, and in further holding that the jurisdiction of the said County Court of Bryan County, Oklahoma, was exclusive of the jurisdiction of the county court of every other county, and particularly to the County Court of Carter County, to confirm such sale.

"(7) That the Supreme Court of Oklahoma misinterpreted the provisions of the Enabling Act, providing for the admission of Oklahoma as a state (34 Stat. 267), and particularly the provisions of Sections 19 and 20 of said act, providing for the transfer of causes pending in the United States Courts of the Indian Territory, at the time of the admission of the State of Oklahoma, and the provisions of the Constitution of the State of Oklahoma, adopted pursuant to said Enabling Act, and particularly the provisions of Sections 1, 2 and 23 of the Schedule to the Constitution, in holding that by the provisions of said acts the guardianship proceeding for the sale

of the lands of the respondents herein, other than William M. Patterson, which was pending in the United States Court for the Southern District of Indian Territory at the time of the admission of Oklahoma as a state, was transferred to the County Court of Bryan County, Oklahoma, and in not holding that said proceeding was transferred by the provisions of said acts to the County Court of Carter County, Oklahoma.

"(8) That the Supreme Court of Oklahoma misinterpreted the provisions of the Federal enactment, known as the Enabling Act (34 Stat. 267), under which Oklahoma was admitted as a state, and particularly Sections 19 and 20 thereof, and the provisions of the Constitution of the State of Oklahoma, adopted pursuant to, and in accepting the provisions of said Enabling Act, and particularly Sections 1, 2 and 23 of the Schedule to said Constitution, and the provisions of the Federal statute adopted May 2, 1890 (26 Stat. 81), and the provisions of Chapter 73 of Mansfield's Digest of the laws of Arkansas, extended in force in Indian Territory by the Federal enactment last mentioned, in holding that an order confirming the sale by guardian of the lands of the respondents herein, other than William M. Patterson, to this petitioner made under the orders of the United States Court for the Southern District of Indian Territory, must have been confirmed within one year from the date of such sale, and in further holding that the sale would take the date of the order of confirmation, instead of the order of confirmation relating back and taking the date of the sale.

"(9) The Supreme Court of Oklahoma misinterpreted the provisions of the Federal act of May 2, 1890 (26 Stat. 81), extending in force in Indian Territory Chapter 73 of Mansfield's Digest of the laws of Arkansas, and particularly misinterpreted

the provisions of Sections 3509, 3510 and 3511 of said digest, as construed by the Supreme Court of Arkansas prior to the extension of said chapter to Indian Territory, in the case of *Reid et al. v. Hart*, 45 Ark. Rep. 41, in not holding that the United States Court for the Southern District of Indian Territory, being the district in which the lands sought to be sold and involved herein, were situated, had exclusive jurisdiction to order and confirm the sale by guardian to this petitioner of the lands of the respondents, other than William M. Patterson, and in not holding that with the coming of statehood the jurisdiction to confirm said sale was by the provisions of the Federal statute, known as the Enabling Act (34 Stat. 267), and particularly Sections 19 and 20 of said act, and the provisions of the Constitution of Oklahoma, adopted pursuant to said act, and particularly Sections 1, 2 and 23 of the Schedule to said Constitution, transferred to the County Court of Carter County, Oklahoma, as its successor in jurisdiction, to complete by confirmation the sale previously had in the said Federal Court of the Southern District.

"(10) When, by act of May 2, 1890 (26 Stat. 81), Congress extended in force in Indian Territory the provisions of Chapters 73 and 97 of Mansfield's Digest, they carried with them the prior constructions of said statutes by the Supreme Court of the State of Arkansas, and such constructions had the force of Federal law, and the constructions necessarily placed upon said chapters by the Supreme Court of Oklahoma in this case are in conflict with said prior constructions thereof by the Supreme Court of Arkansas in the case of *Reid et al. v. Hart*, 45 Ark. Rep. 41, and in the cases of *Ferguson v. Peden*, 33 Ark. Rep. 150; *Jacks v. Chafin et al.*, 34 Ark. Rep. 534, and *Logan et al. v. Jelks*, 34 Ark. Rep. 547.

"(11) The Supreme Court of Oklahoma misconstrued the provisions of the Federal statute of May 2, 1890 (26 Stat. 81), and of Chapters 20 and 49 of Mansfield's Digest of the laws of Arkansas, extended in force in Indian Territory by the Federal act aforesaid, in holding that William M. Patterson took a life estate by curtesy in the lands of Emma Patterson, and further misconstrued the provisions of Chapter 97 of Mansfield's Digest of the laws of Arkansas, extended in force in Indian Territory by the Federal act aforesaid, in holding that the Arkansas Statute of Limitations, plead by this petitioner as a defense in this action, did not operate to terminate such life estate, if he did take one, and by reason of such misinterpretation of said statutes it reached the conclusion that there was outstanding in the said William M. Patterson an intervening life estate, which prevented the running of the Oklahoma Statute of Limitations as against the respondents, Doroth A. Patterson and Shelby A. Patterson, who attained full age more than two years prior to the filing of this suit in the trial court, and against whom the Oklahoma Statute of Limitations was plead as a defense."

ARGUMENT AND AUTHORITIES ON THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Proposition.

The Supreme Court of the United States has jurisdiction to review by Certiorari the decision of the Supreme Court of Oklahoma in this cause.

Subdivision "B" of Section 237 of the Judicial Code as Amended by Act of February 13, 1925 (— Stat. —), reads as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had, where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of

error might be obtained under the proceeding paragraph be an obstacle to granting a review on certiorari under this paragraph."

The Supreme Court of the United States, in a number of decisions, has laid down the rule that where the opinion of the Supreme Court of the state shows upon its face that a Federal question was considered and passed upon adversely to the plaintiff in error, this is sufficient to confer jurisdiction upon the United States Supreme Court, and this is true irrespective of whether or not the Federal question is raised by the pleading.

See:

Mallinckrodt Chemical Works v. Missouri, 238 U. S. 40-41, 59 Law Ed. 1192, 35 S. C. Rep. 671.

North Carolina Railroad Co. v. Zachary, 232 U. S. 248, 58 Law Ed. 592, 34 S. C. Rep. 305.

Alvin L. Leigh v. Henry S. Green, 193 U. S. 79, 48 Law Ed. 623.

Myer v. City of Richmond, 172 U. S. 82, 43 Law Ed. 374, 19 S. C. Rep. 106.

Arrowsmith v. Harmoning, 118 U. S. 194, 30 Law Ed. 243, 6 S. C. Rep. 1023.

From the syllabus of the case of *State of Montana ex rel. Charles S. Haire v. James H. Rice, as State Treasurer*, 204 U. S. 291, 51 Law Ed. 490, we take the following language:

"A right claimed under an authority exercised under the United States will be regarded as 'special.

ly set up or claimed,' within the meaning of U. S. Rev. Stat. 709, defining the appellate jurisdiction of the Supreme Court of the United States over state courts, where it clearly and unmistakably appears from the opinion of the state court that the Federal question was assumed to be in issue; that the decision was against the Federal claim, and that the decision of the question was essential to the judgment rendered."

To the same effect is the case of *San Jose Land & Water Co.* v. *San Jose Ranch Co.*, 189 U. S. 177, 47 Law Ed. 765. From the body of this opinion we take the following extract:

"While the right under the act of 1887, thus considered, was not originally specially set up and claimed by the plaintiff, inasmuch as it was not an original right, but a right available in rebuttal of the defense, it is one which appears to have been insisted upon in the argument; and under the rule of this court requiring the opinions to be sent up with the record, it has been frequently held to be a sufficient compliance with the words 'specially set up and claimed' that it was fully considered in the opinion of the court and ruled against the plaintiff in error. *Murdock* v. *Memphis*, 20 Wall. 590, 633, 22 L. Ed. 429, 443; *Gross* v. *United States Mortg. Co.*, 108 U. S. 477, 27 L. Ed. 795, 2 Sup. Ct. Rep. 940; *Fire Association of Philadelphia* v. *New York*, 119 U. S. 110, 115, 30 L. Ed. 342, 345, 7 Sup. Ct. Rep. 108; *Egan* v. *Hart*, 165 U. S. 188, 41 L. Ed. 680, 17 Sup. Ct. Rep. 300; *Sayward* v. *Denny*, 158 U. S. 180, 184, 39 L. Ed. 941, 942, 15 Sup. Ct. Rep. 777; *Mallett* v. *North Carolina*, 181 U. S. 589, 45 L. Ed. 1015, 21 Sup. St. Rep. 730."

In the case of *Thomas Murdock et al. v. The Mayor and Aldermen of Memphis et al.*, 20 Wall. 590, 22 L. ed. 429, the Supreme Court of the United States laid down the rule that it would examine the duly certified opinion of the Supreme Court of the state in order to determine what Federal questions had been considered or passed upon by the state court in arriving at its judgment.

In Volume 63, Lawyers' Reports Annotated, at page 331, reference is made to the opinion in the case of *Murdock et al. v. Mayor and Aldermen of Memphis et al.*, aforesaid, and the annotator calls attention to the language of the court in said case, to the effect that there is now no reason why it should not look to the properly authenticated opinion of the state court whose decision is brought up for review so far as might be useful in determining whether any Federal question was passed upon in the state court, and in support of this rule we find there cited the following cases:

"*McManus v. O'Sullivan*, 91 U. S. 578, 23 L. ed. 320; *Gross v. United States Mortg. Co.*, 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940; *Adams County v. Burlington & M. Ry. Co.*, 112 U. S. 123, 28 L. ed. 678, 5 Sup. Ct. Rep. 77; *Detroit City R. Co. v. Guthard*, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811; *Jacks v. Helena*, 115 U. S. 288, 29 L. ed. 392, 6 Sup. Ct. Rep. 39; *Fire Asso. v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108; *Martin v. Thompson*, 120 U. S. 376, 30 L. ed. 679, 7 Sup. Ct. Rep. 586; *Kreiger v. Shelby R. Co.*, 125 U. S. 39, 31

L. ed. 675, 8 Sup. Ct. Rep. 752; *Dale Tile Mfg. Co.* v. *Hyatt*, 125 U. S. 46, 31 L. ed. 683, 8 Sup. Ct. Rep. 756; *Walter A. Wood Mowing & Reaping Mach. Co.* v. *Skinner*, 139 U. S. 293, 35 L. ed. 193, 11 Sup. Ct. Rep. 528; *Dibble* v. *Bellingham Bay Land Co.*, 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939. And this change in the rule is recognized in *United States* v. *Taylor*, 147 U. S. 695, 37 L. ed. 335, 13 Sup. Ct. Rep. 479; *Sayward* v. *Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Thompson* v. *Maxwell Land Grant & R. Co.*, 168 U. S. 457, 42 L. ed. 542, 18 Sup. Ct. Rep. 121; *Lamb* v. *Columbia Twp.*, 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174."

See also *Grayson* v. *Harris*, — U. S. —, 69 L. ed. —, 45 Sup. Ct. Rep. 317, holding procedure by certiorari proper.

In the light of the authorities cited *supra*, we again direct the Court's attention to the opinion of the Supreme Court of Oklahoma in the case now under consideration, and to the fact that of necessity the determination of every issue decided by the court in that case rests upon the construction of Federal statutes, or the laws of the State of Arkansas, extended in force by Federal statutes, and having the force of Federal statutes in Indian Territory prior to statehood, and of rights claimed by this petitioner by virtue of said acts and statutes, or by virtue of the provisions of the Enabling Act, under which Oklahoma was admitted as a state, and the provisions of the Constitution of the State of Oklahoma, adopted pursuant thereto.

As we have previously said, the court, in the decision of this case, held that William M. Patterson took a life estate in the lands of his deceased wife, Emma Patterson, a one-eighth blood Choctaw Indian, whose allotment was selected and filed by the said William M. Patterson as administrator of the estate of his deceased wife; she died in Indian Territory in 1896, prior to statehood, and in determining whether or not William M. Patterson took a life estate, the Supreme Court of necessity construed the provisions of Chapters 50 and 49 of Mansfield's Digest of the laws of Arkansas, and the provisions of the act of May 2, 1890 (26 Stat. 81), extending said chapters of Mansfield's Digest in force in Oklahoma, and the provisions of the Choctaw Chickasaw Supplemental Agreement (32 Stat. 641), and other Congressional enactments, and said opinion specifically mentions and construes Section 22 of said Choctaw Chickasaw Supplemental Agreement and Chapter 49 of Mansfield's Digest of the laws of Arkansas.

In determining and holding that William M. Patterson's right of action was not barred by the statute of limitations, it necessarily construed the Congressional Act of May 2, 1890 (26 Stat. 81), and Chapter 97 of Mansfield's Digest of the laws of Arkansas, extended in force in Indian Territory by said act, and by specific

mention it holds that said Arkansas Statute of Limitations did not run as against the right of action of said respondent.

On the face of said opinion it holds that the Oklahoma Statute of Limitations did not run as against Doroth A. Patterson and Shelby A. Patterson, minors, who became of age more than two years prior to the filing of this action, because William M. Patterson held an intervening life estate. This holding also necessitated the construction of all of the Federal statutes and laws of Arkansas mentioned *supra*.

The opinion on its face specifically holds that the guardianship sale of the lands involved herein to your petitioner was void, and this holding necessitated the construction of the Federal statute of May 2, 1890 (26 Stat. 81), and Chapter 73 of Mansfield's Digest of the laws of Arkansas pertaining to the sale of lands by guardians, extended in force in Indian Territory, to determine whether or not the United States Court for the Southern District of Indian Territory had jurisdiction to order the sale of said lands, and the construction of the Congressional enactment, known as the Enabling Act, under which Oklahoma was admitted into the Union as a state (34 Stat. 267), and the construction of the provisions of the Oklahoma Constitution, accepting said Enabling Act,

and adopted pursuant thereto, in order to determine what Oklahoma court inherited the jurisdiction of the Federal Court to confirm said sale, and in determining these matters the Supreme Court, by specific mention, construes Section 19 of the Enabling Act, and Section 23 of the Schedule to the Constitution, and holds that by virtue thereof the jurisdiction confirming said sale was transferred from the Federal courts to the County Court of Bryan County, instead of the County Court of Carter County.

The Supreme Court of Oklahoma also necessarily construes the provisions of the Federal Act of May 2, 1890 (26 Stat. 81), cited *supra*, and of Chapter 73 of Mansfield's Digest, extended in force in Indian Territory thereby, when it holds as it does in this opinion that a sale made under these acts must have been confirmed in one year from the date of sale.

We do not deem it necessary to cite further authorities in support of our contention that the Supreme Court of the United States has jurisdiction to review this decision of the Supreme Court of Oklahoma, since there can be no question but that the decision is based wholly upon the construction of Federal statutes, without construing which the opinion herein could not have been arrived at. This opinion destroys the rights and title of this peti-

tioner to the lands involved in this action, which rights and title are of necessity based upon and claimed under Federal statutes and authority exercised thereunder.

We respectfully submit, therefore, that this Honorable Court should assume jurisdiction and review the decision of the Supreme Court of Oklahoma by writ of certiorari.

ARGUMENT AND AUTHORITIES ON MERITS OF FEDERAL QUESTION DECIDED.

Proposition No. One.

Under the provisions of the Federal Statutes, and of the Laws of Arkansas having the force of Federal Statutes extended in force thereby in Indian Territory, and in force in said territory at the time of the death of Emma Patterson, and necessarily construed by the Supreme Court of Oklahoma in arriving at its opinion herein, William M. Patterson took no estate by curtesy in the lands of his deceased wife, allotted in her name by her administrator after her death, and the opinion of the Supreme Court of Oklahoma holding that he took such estate therein is erroneous.

Under the foregoing caption we will discuss assignments of errors numbers one, two and three, as set forth in the petition for review filed herewith.

Reference to the agreed statement of facts, set out *supra*, will disclose that Emma Patterson was a Mississippi Choctaw Indian of one-fourth blood; that she died on the 14th day of May, 1906, in the Central District of Indian Territory without having selected her

allotment; that the respondent, William M. Patterson, was her husband, and that at the time of her death she left surviving her her said husband and Doroth A. Patterson, Shelby A. Patterson, Howell M. Patterson, J. Allen Patterson and Ruby E. Patterson, all one-eighth blood Choctaw Indians, and children of her marriage with the said William M. Patterson; that William M. Patterson was a white man of no Indian blood, and that his name did not appear on the tribal rolls, and he was not a citizen of the Choctaw or Chickasaw Tribes of Indians.

After the death of Emma Patterson, William M. Patterson, her husband, acting as her administrator, selected and filed the lands involved in this suit in the name of Emma Patterson, and as her share of the tribal lands of the Choctaw and Chickasaw Tribes of Indians.

Under the foregoing state of facts, your petitioner contends that William M. Patterson took no estate by curtesy in the lands allotted in the name of his deceased wife.

If William M. Patterson took an estate by curtesy in said lands, he took it under and by virtue of the Federal statutes relating to the allotment of Indian lands and extending certain chapters of the laws of Arkansas in force in Indian Territory, and we contend that under these statutes he took no such estate.

In this connection, we respectfully direct the court's attention to the Congressional enactment of May 2, 1890 (26 Stat. 81, Sec. 31), extending in force in Indian Territory, among other chapters of the laws of the State of Arkansas, Chapters 20 and 49 of Mansfield's Digest of the laws of said state. This Federal statute had been enacted long prior to the death of Emma Patterson.

We also direct the court's attention to the Federal enactment of July 1, 1902, known as the Choctaw Chickasaw Supplemental Agreement (32 Stat. 641), and we particularly call the court's attention to Section 22 of said statute, which reads as follows:

> "If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in Chapter forty nine of Mansfield's Digest of the Statutes of Arkansas: Provided, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted."

It is upon the foregoing statutes that William M. Patterson predicates his claim to a life estate by curtesy in the lands of his wife, Emma Patterson, and it is these statutes which the Supreme Court of Oklahoma construes, and specifically cites in determining that William M. Patterson does have such an estate.

It is our contention that under the foregoing statutes William M. Patterson does not take an estate by curtesy in the lands involved in this suit.

It will be noted that Section 22 of the Choctaw-Chickasaw Supplemental Agreement, quoted *supra*, specifically provides that where a person whose name appears upon the rolls of said tribes shall have died before receiving the allotment to which he would have been entitled if living, that it shall be allotted in his name and shall descend to his HEIRS according to the laws of descent and distribution as provided in CHAPTER 49 OF MANSFIELD'S DIGEST OF THE STATUTES OF ARKANSAS.

We have capitalized above the words which we particularly wish to stress; the descent is to the HEIRS of the allottee, and it is not according to the laws of the State of Oklahoma as a whole, but according to the provisions of CHAPTER 49 OF MANSFIELD'S DIGEST OF THE STATUTES OF ARKANSAS.

As we shall point out further along in this brief, one who claims an estate by curtesy, under the state of facts which we have under consideration in this case, cannot, under the laws of Arkansas, as construed both by the Federal courts and the courts of Oklahoma, consistently do so as an HEIR, and if the descent is to be according to the provisions of Chapter 49 of Mansfield's Digest of the Laws of Arkansas on any other theory than as an heir, it cannot be sustained by said chapter, because there is not one line in the whole chapter in regard to an estate by curtesy.

We desire to stress the fact that it is not this Chapter 49 of the Laws of Arkansas which creates or provides for an estate by curtesy, but that said estate by curtesy is provided for by CHAPTER 20 OF THE LAWS OF ARKANSAS.

Section 22 of the Choctaw Chickasaw Supplemental Agreement, above referred to, says nothing whatever about these lands descending in accordance with the provisions of CHAPTER 20 OF THE LAWS OF ARKANSAS, or the laws of Arkansas generally, but points out one specific chapter, being CHAPTER 49, and says that these lands shall descend according to the provisions of that chapter, and in it we find not one line on the subject of curtesy.

We conclude, therefore, that under the plain wording of the statutes themselves there was never any intent that the lands should descend, under the circumstances in this case, subject to a life estate by curtesy in the husband.

There is a long line of decisions holding that in a case of this kind, if the husband should die the wife would take a dower interest; this holding is correct, and we agree with it. The difference is that Chapter 49 of Mansfield's Digest does deal with and provide for a dower interest, but it does not deal with or provide for a curtesy interest.

This distinction being pointed out, we do not deem it necessary to discuss the line of authorities dealing with the subject of dower.

As we have previously said, it is Chapter 20 of the Laws of Arkansas which deals with the subject of curtesy; the applicable portion of this chapter is Section 366 of Mansfield's Digest, and it reads as follows:

> "The common law of England, so far as the same is applicable and of a general nature, and all statutes of the British Parliament in aid of or to supply the defect of the common law made prior to the fourth year of James the First (a) (that are applicable to our own form of government), of a general natural and not local to that kingdom, and not inconsistent with the constitution and laws of the United States or the constitution and laws of

this state, shall be the rule of decision in this state unless altered or repealed by the general assembly of this state."

It will be noted that this is an adoption of the common law of England on the subject of curtesy, and we must then conclude that that law, when adopted by the State of Arkansas, was adopted with the constructions placed upon it by the highest courts of England prior to such adoption.

(See authorities submitted under Proposition Number Five of this brief.)

This chapter was in turn extended in force in Indian Territory by the Congressional enactment of May 2, 1890 (26 Stat. 81), and prior to such extension in force in said Territory it had been construed by the Supreme Court of Arkansas in a number of cases, which we shall hereafter cite, but at this time we particularly point out the case of *McDaniel v. Grace et al.*, 15 Ark. 466.

Our first contention is that Section 22 of the Choctaw-Chickasaw Supplemental Agreement, cited *supra*, makes no reference whatever to the descent of the lands involved in this action according to the provisions of Section 20; that it makes no provision for the descent of said lands according to the provisions of the Laws

of Arkansas generally, but that it does provide for the descent of said lands according to the provisions of one specific chapter of the Laws of Arkansas—Chapter 49 of Mansfield's Digest—which contains not a single line in regard to the subject of curtesy, and that, therefore, it is plain upon the face of the statute that there was never any intent that, under the state of facts which confronts us in this case, William M. Patterson would take an estate by curtesy.

Our second contention is, that if it be held that the intent was that the descent of these lands should be according to the laws of Arkansas generally, that still William M. Patterson would take no estate by curtesy, because the elements or conditions essential to the English common law right of curtesy are not present in this case.

The almost universal holding of the courts, both state and federal, is that to create an estate by curtesy under the common law of England the following essentials are necessary:

(a) That the wife be seized of an estate of inheritance to which issue of the marriage may possibly succeed as heir to the wife.

(b) That seizin in deed (less properly styled actual seizin) be obtained during coverture.

(c) That issue be born alive.

(d) The death of the wife.

The transpiring of all of these events constitute the contingency upon which an estate by curtesy vests in the husband, and if any one of these four essentials be not present, no such estate is created.

This construction was placed upon the Arkansas statute in the case of *McDaniel v. Grace et al.*, 15 Ark. Rep. 466, cited *supra*, long prior to the adoption and extension of Chapter 20 of the Arkansas Laws in Indian Territory, and as will be seen according to the authorities submitted in this brief in the argument of Proposition Number Five, that construction of the Arkansas court was adopted by Congress when it extended Chapter 20 in force in said Territory; if, then, it be held that the lands allotted in this case by William M. Patterson, a white man, in the name of Emma Patterson, his deceased wife, descended according to the laws of the State of Arkansas generally, we must determine whether or not the four elements hereinbefore pointed out as essential to an estate by curtesy in the husband of the deceased, Emma Patterson, are present; and the facts disclose that the first two are absent. That is to say, Emma Patterson was not seized of an estate of inheritance, and there was no actual seizin of said lands in her during her life time.

It is admitted by the agreed statement of facts filed in this case that Emma Patterson had not even selected

here allotment, to say nothing of having gone into possession of same, before her death; the selection was made and the allotment was filed by her husband, William M. Patterson, after her death, and it is a physical impossibility that she could have been in actual possession of said lands during her life time.

In the case of *Lessee of John Mercer and Mary Scott Mercer* v. *William Cary Selden*, — U. S. —, 11 Law. ed. 38, the last paragraph of the syllabus by the Supreme Court of the United States is as follows:

> "The general rule of law is, that there must be an entry during coverture, to enable the husband to claim a tenancy by the curtesy."

And in the body of the opinion we find the following language:

> "In 1 Coke on Litt. 29, Ch. 4, Sec. 35, it is said: 'Tenant by the courtesy of England is, where a man taketh a wife seized in fee simple, or in fee-tail general, or seized as heir in tail special, and hath issue by the same wife, male or female, born alive, albeit the issue after dieth or liveth, yet if the wife dies, the husband shall hold the land during his life, by the laws of England.' 'And first, of what seizin a man shall be tenant by the courtesy. There is in law a two-fold seizin, viz., a seizin in deed and a seisin in law. And here Littleton intendeth a seisin in deed, if it may be attained unto, as if a man dieth seized of lands in fee simple, or fee-tail general, and these lands descend to his daughter, and she taketh a husband and have issue, and dieth before any entry, the husband shall

not be tenant by the courtesy; and yet in this case she had a seisin in law; but if she or her husband had during her life entered, he should have been tenant by the courtesy.' The wife at common law was endowable where there had been no actual possession, and the reason is, that during coverture she could not take possession of the lands of her husband. *But actual seisin was necessary to enable the husband to claim as tenant by the courtesy.*"

It so happens that the Supreme Court of the United States has had occasion to refer to the case of *McDaniel v. Grace et al.*, 15 Ark. Rep. 466, referred to by us *supra*, and we respectfully direct the court's attention to the case of *J. H. Allen et al. v. Helena Hanks*, 136 U. S. 300, 34 Law. ed. 414, from which decision we quote as follows:

"When the Constitution of 1868 was adopted, the appellee's husband could have no estate by the curtesy in lands not then owned by her; for, as was said by the Supreme Court of Arkansas in *McDaniel v. Grace*, 15 Ark. 465, 483, except when from the nature and circumstances of the real property of the wife she may be regarded as constructively in possession (as where it consists in wild lands, or it is impossible or impracticable to enter upon them), marriage, actual seisin of the wife, issue, and death of the wife, are all requisite to create an estate by the curtesy; *and that the husband was not entitled to his curtesy, according to the common law, unless the wife was seized in fact and in deed.* *Mercer v. Sheldon*, 42 U. S. 1, How. 37, 54 (11:38, 45); *Davis v. Mason*, 26 U. S. 1 Pet. 503, 507 (7:239, 240); Kent Com. 29, 30."

From the body of the opinion in the case of *McDaniel v. Grace et al.*, 15 Ark. Rep. 465, cited *supra*, and referred to in the foregoing opinion by the United States court, we take the following language:

> "We have no statute on the subject of the curtesy of the husband in the wife's land. By the common law, tenancy by the curtesy is an estate for life, created by the act of the law. When a man marries a woman, seized at any time during the coverture of an estate of inheritance in severalty, in coparcenary, or in common, and hath issue by her born alive, and which might, by possibility, inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life, and it is immaterial whether the issue be living at the time of the seizin, or at the death of the wife, or whether it was born before or after the seizin. 4 Kent Com. 289; 1 Hilliard 110, 111.
>
> "Four things are requisite to an estate by the curtesy, viz: marriage, actual seizin of the wife, issue, and death of the wife. *It. The wife, according to the English law, must have been seized in fact and in deed, and not merely of a seizin in law of an estate of inheritance, to entitle the husband to his curtesy.* 4 Kent. 30."

The foregoing opinion was written by the Supreme Court of Arkansas in 1855.

See also the cases of

Hampton v. Cook, 64 Ark. 353, 62 Am. St. Rep. 194.

Neeley v. Lancaster, 47 Ark. 175, 58 Am. St. Rep. 752.

Owens v. Jahine, 115 S. W. 383.
Harrod v. Myers, 21 Ark. 600.
Quinn v. Ladd, 39 Ore. 261, 59 Pac. 457.
Crowley v. Grant, 127 Pac. 28.
Stoddard v. Gibbs, 23 Fed. Cas. No. 13,468.
Mapin v. Maupin, 110 S. W. 840.
Parsons v. Justice, 174 S. W. 725.
Evans v. Morris, 136 S. W. 408.

See, also, 2 Blackstone 127, where it is said:

"*The seizin of the wife must be an actual seizin, or possession of the lands; not a bare right to possess, which is a seizin in law, but an actual possession, which is a seizin in deed.*"

The foregoing authorities leave no question of doubt but that there must have been an actual seizin in Emma Patterson of the lands involved in this suit during her life time, in addition to the other essentials hereinbefore pointed out by us, before an estate by curtesy would vest in William M. Patterson; there was no such possession; she died before even selecting her allotment, to say nothing of having been in possession of it, and therefore no such estate ever vested in William M. Patterson.

In further support of our contention that Emma Patterson neither owned nor possessed the specific lands allotted to her prior to her death, we call the court's attention to the case of *Hooks et al. v. Kennard*, 28 Okla. 457, 114 Pac. 744, where the Supreme Court of

Oklahoma held that the *inception of the title of an Indian allottee, or his heirs, is the filing upon the land.*

Bear in mind that the land in question in the case now before the court was not filed upon until after Emma Patterson's death, and then by her administrator.

See, also, the cases of:

DeGraffenreid v. Iowa Land & T. Co., 20 Okla. 687, 95 Pac. 624
Barnett v. Way, 29 Okla. 780, 119 Pac. 418
Bledsoe v. Wortman, 35 Okla. 261, 129 Pac. 841.

In the case of *Sanders v. Sanders*, 28 Okla. 59, 117 Pac. 338, the Supreme Court of Oklahoma had before it the question of whether or not a right of curtesy existed where the wife died prior to the selection of the land, and in that case it held that such right did not exist.

Supporting our contention that there could have been no actual seizin of the lands in Emma Patterson during her lifetime, the following line of authorities *hold that there is no individual interest in any individual Indian prior to the actual selection of his allotment:*

Cherokee Nation v. Hitchcock, 187 U. S. 294.
Delaware Indians v. Cherokee Nation, 193 U. S. 127.

Stephens v. Cherokee Nation, 174 U. S. 445.
Gritts v. Fisher, 224 U. S. 640.
Franklin v. Lynch, 233 U. S. 269.
Sizemore v. Brady, 235 U. S. 441.
Woodward v. DeGraffenreid, 238 U. S. 284.
McKee v. Henry, 201 Fed. 74.
Hayes v. Barringer, 168 Fed. 221.
Braun v. Bell, 192 Fed. 427.
Gena Tippett Arnold v. Ardmore Chamber of Commerce Industrial Corporation, 4 Fed. (2nd ser.) 838.

From the case of *Sizemore v. Brady*, 235 U. S. 441, 59 L. ed. 308, we take the following quotation:

> "*The selection or allotment of the land was the initiatory step, and was prerequisite to the vesting of any individual title or interest in the land of the tribe. Hooks v. Kennard*, 28 Okla. 457, 114 Pac. 744; *DeGraffenreid v. Iowa Land & T. Co.*, 20 Okla. 687, 95 Pac. 624; *McKee v. Henry*, 119 C. C. A. 412, 201 Fed. 74; *Braun v. Bell*, 192 Fed. 427; *Hayes v. Barringer*, 93 C. C. A. 507, 168 Fed. 221."

We have previously stated that the right of William M. Patterson to an estate by curtesy in these lands could not possibly be predicated on the theory of *inheritance*, and have called the court's attention to the term HEIR as used in Section 22 of the Choctaw Chickasaw Supplemental Agreement, cited *supra*.

The court will bear in mind that the agreed statement of facts, set out *supra*, discloses that William M. Patterson was and is a *non-citizen white man possessing no Indian blood whatever*, and not on the tribal rolls.

The law seems to us to be thoroughly settled that a white citizen of the United States COULD NOT INHERIT the allotted land of a member of the Choctaw-Chickasaw Tribes of Indians prior to the admission of the State of Oklahoma into the Union.

See the case of *Gillam* v. *Anglin*, 44 Okla. 684, 145 Pac. 1145. It will be noted that in the body of the foregoing opinion Mr. Justice Harrison quotes with approval the case of *Shulthis* v. *McDougal*, 170 Fed. 529, where this question was before the Eighth Circuit Court of Appeals.

Also the cases of *Pigeon et al.* v. *Buck*, 38 Okla. 101, 131 Pac. 1083, and *Roberts* v. *Underwood*, 38 Okla. 376, 132 Pac. 673. The two last mentioned cases were appealed to the Supreme Court of the United States and there affirmed.

We respectfully direct the court's attention to the following cases by the last mentioned court:

Daniel A. McDougal v. *Edmond McKay*, 237 U. S. 372, 59 L. ed. 1001, from the syllabus of which we quote as follows:

> "The allotment of an infant Creek Indian who was enrolled after death under the Supplemental Creek Agreement of June 30, 1902 (32 Stat. at L. 500, Chap. 1323), passes to his father in fee simple where this latter is of Creek blood and the mother

is not, since the allotment cannot, in view of decisions already rendered by the circuit court of appeals for the eighth circuit and by the supreme court of the state of Oklahoma, be regarded as a 'new acquisition' within the meaning of the provision of Mansf. (Ark.) Dig., Chap. 49, Sec. 2531, made applicable by that agreement, that if the estate of a person dying intestate without descendants be a new acquisition, it shall pass to the father for his lifetime, and then descend to the collateral kindred of the intestate, but such allotment must be treated as an ancestral estate within the meaning of the other provisions of that section that if the estate comes by the father, it shall ascend to the father and his heirs, and if from the mother, to her and her heirs.

"(For other cases, see Indians, 8, in Dig. Sup. Ct. 1908.)"

See, also, *Pigeon et al. v. Buck*, 227 U. S. 386, 59 L. ed. 1067.

In the light of the foregoing authorities we assert with confidence that William M. Patterson could not possibly take an estate by inheritance in the lands of his deceased wife, Emma Patterson, and since it is an estate by inheritance that is spoken of in Section 22 of the Choctaw-Chickasaw Supplemental Agreement, and since no estate by curtesy is provided for in Chapter

49 of Mansfield's Digest, therein referred to, we are lead to conclude that under the state of facts confronting us in this case it was not the intent nor purpose that a white husband of non-Indian blood should take an estate by curtesy in the lands allotted in his wife's name after her death.

We submit, therefore, that William M. Patterson took no curtesy estate in the lands of Emma Patterson, but that said lands descended to the other respondents herein, being the children of Emma Patterson, unincumbered of any life estate in their father, William M. Patterson.

Proposition No. Two.

If it be held that under the provisions of the Federal Statutes, and the laws of Arkansas having the force of Federal statutes in force in Indian Territory at the time of the death of Emma Patterson, her husband, William M. Patterson, did take an estate by curtesy in the lands selected and allotted in her name by her administrator after her death, then his right to assert such estate as against U. Sherman Joines, your petitioner, is barred by the Federal Statutes and laws of Arkansas extended in force in Indian Territory thereby necessarily construed by the Supreme Court of Oklahoma in arriving at its opinion herein, and the opinion of said court holding that such right of action is not barred is erroneous.

Under this caption we desire to discuss assignments of error numbers one and four, particularly number four.

By referring to the answer filed by this petitioner

in the trial court, and referred to *supra*, which is set out at length in the Transcript filed herewith, it will be seen that this petitioner specifically plead the Arkansas Statute of Limitations as a defense to the right of the respondent, William M. Patterson, to maintain this action; the trial court held that his right of action was barred by said Arkansas Statute, but in its final opinion filed herein the Supreme Court of Oklahoma held that said right of action was not barred by the Arkansas Statute, for the reason that the deed under which your petitioner claims was void, and that he has no color of title to said premises.

It is our contention that this statute operates to bar any action by the respondent, William M. Patterson, irrespective of whether or not this petitioner's deed was or is valid or void,, and in fact irrespective of whether or not he claimed under any deed at all.

The respondents in their petition assert that U. Sherman Joines went into possession of said lands in July, 1907, and that he has been in open adverse possession ever since, and it is so stipulated in the agreed statement of facts upon which this case was tried.

It is further stipulated that the original deed executed by William M. Patterson, as guardian, in favor of your petitioner, bears date of the 5th day of October,

1907. This stipulation discloses that your petitioner went into actual possession of said lands some months prior to the admission of Oklahoma as a state and while the laws of Arkansas were in force in Indian Territory.

The Congressional enactment of May 2, 1890 (26 Stat. 81), extended in force in Indian Territory Chapter 97 of Mansfield's Digest of the Laws of Arkansas. The pertinent sections of this chapter are Sections 4471 and 4476 of said digest, and the pertinent parts of these sections read as follows, to wit:

> "Section 4471. No person or persons, or their heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments but within seven years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued; and all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments shall be had and sued within seven years next after title or cause of action accrued, and no time after said seven years shall have passed. * * * ."
>
> "Section 4476. No action for the recovery of real property, when the plaintiff does not claim title to the lands, shall be brought or maintained when the plaintiff, or his testator or intestate, has been five years out of possession. Rev. Stat., Chap. 53, Sec. 20."

Under the allegations of the respondents' own petition their right of action accrued in July, 1907, when

your petitioner went into open adverse possession of said lands.

The Supreme Court of Oklahoma, in the case of the *United States Fidelity & Guaranty Co.* v. *Fidelity Trust Co. et al.*, 49 Okla. 398, 153 Pac. 195, said:

> "Where one person may rightfully sue another, a cause of action has accrued, and the statute of limitations begins to run."

The case of *Patterson* v. *Bonner*, 73 Okla. 224, 175 Pac. 826, is to the same effect.

An examination of the file marks on respondents' petition, set out in the Transcript filed herewith, discloses that this suit was filed on the 21st day of February, 1920, some thirteen years after respondents' cause of action had accrued.

The Supreme Court of Oklahoma has, in a number of cases, held that where a cause of action arose in Indian Territory under the Arkansas laws in force there in prior to statehood, that it is the Arkansas statute which operates, and not the Oklahoma statute. See the following authorities:

Patterson v. *Rousuey*, 58 Okla. 185, 159 Pac. 636.

Davis v. *Foley*, 60 Okla. 86, 159 Pac. 646.

Sittel v. *Wright*, 3rd Ind. Ter. 684, 64 S. W. 576.

The court, in its opinion in the case now under consideration, bases its decision on the ground that the Arkansas statute would not run because your petitioner has no color of title to said land.

Fortunately, the Arkansas statute of limitations, to which we refer, had been repeatedly construed by the highest court of the State of Arkansas, prior to its adoption and extension in force in Indian Territory, and we again take the liberty of referring this Court to the authorities cited in the argument of our Proposition Number Five herein, to sustain our contention that when this Arkansas Statute of Limitations was extended in force in Indian Territory, the constructions previously placed upon it by the highest court of the State of Arkansas were likewise extended in force in said territory. We now wish to call the Court's attention to the constructions placed upon these statutes by the Arkansas court.

In the case of *Ferguson v. Peden*, 33 Ark. Rep. 150, this question arose, and from the syllabus of the case we quote as follows:

> "A deed or color of title is not necessary to maintain the statute bar to the extent of the actual adverse occupancy."

From the body of the opinion in this case, on page 155, we take the following language:

> "Justice Cowen, in delivering the opinion of the

court in *Hanbest v. Trinity Church*, said: "So long as a man is in possession of land, claiming title, however wrongfully, and with whatever degree of knowledge that he has no right, so long the real owner is out of possession, in a constructive as well as an actual sense, it is of the nature of the statute of limitation, when applied to civil actions, in effect, to mature a wrong into a right, by cutting off the remedy. To warrant its application in ejectment, the books require *color of title*, by deed or other documental semblance of right in the defendant, *only when the defense is founded on a constructive adverse possession. But neither a deed nor any equivalent monument is necessary, where the possession is indicated by actual occupation, and any other evidence of an adverse claim exists. The monument is but one circumstance by which to make out an adverse possession.*"

The Supreme Court of Arkansas again had this question before it in the case of *Jacks v. Chafin et al.*, 34 Ark. Rep. 531. Paragraph four of the syllabus of this case reads as follows:

"Possession of land during the full period of limitation, under such circumstances as would make a valid defense, amounts to an *investiture of title which may be actually asserted in all respects, as effectively as if acquired by deed.* The continuity of possession has reference to the time the statute is running, and is not necessary after the bar has attached."

From the body of the same opinion, on page 541, we take the following extract:

"The weight of authority in the United States seems now in favor of the doctrine that possession

of land during the full period of limitation, under such circumstances as would make a valid defense, amounts to an investiture of title; which may be actively asserted, in all respects as effectively as if acquired by deed. (See cases referred to in Wash. on R. Property, Book 3, Chap. 2, Sec. 7, Sub. Sec. 48). This court has repeatedly approved this view of the effect of the statute. It was applied to a case of personal property in *Hicks* v. *Flint*, 21 Ark., p. 463, and is announced, or underlies, the reasoning in *Sharp* v. *Johnson*, 22 Ark. 79; *Walker* v. *Towns*, 23 Ark 147; *Kirby* v. *Lantrae et al.*, 26 Ark. 568; *Mayo & Jones* v. *Cartwright*, 30 Ark. 407; *Mooney et al.* v. *Coolidge*, ib. 460; *Ferguson* v. *Peden* (M. S.). The continuity of possession, always insisted upon, has reference to the time during which the statute is running, and is not necessary after the bar has attached."

To the same effect is the case of *Logan et al.* v. *Jelks*, 34 Ark. Rep. 547. The syllabus of this case sets forth the law as follows:

"A void patent may be used to give color of title and fix the limits of possession, and a continuous adverse possession under it, or without any color at all, when the limits of possession may be shown, for a period of over seven years, as against parties whose rights are not saved, will create a title which may be used to maintain ejectment."

The Arkansas court, in the body of the opinion, at page 549, uses the following language:

"Conceding the patent from the United States to have been void, it may be, nevertheless, used to give color of title and fix the limits of possession, and a

continuous adverse possession under it, or without any color at all, when the limits of possession may be shown for a period of over seven years as against parties whose rights are not saved, will creat a title which may be used to maintain an action of ejectment. This question has been directly decided in the case of *Jacks* v. *Chaffin*, at the present term, and the principles of that case govern this."

It will be noted that the decision in the cases of *Jacks* v. *Chaffin et al.*, and *Logan et al.* v. *Jelks*, cited *supra*, were decided by the Supreme Court of Arkansas in the November 1879 Term, and that the case of *Ferguson* v. *Peden*, *supra*, was decided shortly before that date; all of them construe the Arkansas seven year statute of limitations, and all of these constructions had been placed upon that statute before its extension in force in Indian Territory by the Congressional enactment of May 2, 1890 (26 Stat. 81). Therefore, we have a uniform and settled construction, which is adopted along with the adoption of the statute of limitations of Arkansas construed thereby, which construction, as well as the statute, had the force of Federal law in Indian Territory.

The construction adopted by Congress is in direct conflict with the construction which the Supreme Court of Oklahoma now seeks to place upon the same statute. In determining the issues under consideration, the Arkansas cases hold that no color of title whatever is necessary in order to start the statute of limitations running;

that mere adverse possession for the period of seven years creates the bar, and not only this, but in addition thereto, continuous adverse possession under said statute with or without color of title will of itself create title, which may be used affirmatively as the basis of an action of ejectment.

The Supreme Court of Oklahoma, on the other hand, in its opinion sought to be reviewed in this action, holds that the statute of limitations of Arkansas does not operate to bar this action, for the reason that your petitioner's deed was void and he has no color of title.

Here is an absolute conflict between the holding of the Supreme Court of Oklahoma and the Arkansas statute, with the constructions placed thereon by the Arkansas court, and adopted by the Act of Congress of May 2, 1890 (26 Stat. 81), and the opinion of the Supreme Court of Oklahoma is necessarily erroneous.

Not only is this true, but we respectfully submit that the holding of the Supreme Court of Oklahoma in this case is not in line, nor consistent with, the former holdings of the same court in numerous other cases, which it does not undertake to overrule by this decision. It is true that the other holdings, to which we refer, largely construe the Oklahoma statute, but there is nothing in the language of the two statutes which would bring

about a different construction of the Oklahoma statute from that of the Arkansas statute, insofar as the requirement that there must be color of title before the statute starts to run, is concerned, and in the cases which we shall now cite the Supreme Court of Oklahoma has uniformly held that no color of title whatever is necessary, and that the statute will run even as against a void deed.

One of the earlier cases by the Supreme Court of Oklahoma on this point is that of *Dodson v. Middleton et al.*, 38 Okla. 763, 135 Pac. 368. The syllabus of this case reads as follows:

> "Where the grantee went into possession of real estate immediately after the purchase thereof by him at a void guardian's sale, and such grantee and those claiming under him remain continuously in possession thereof thereafter, and where the action to recover said real estate is not brought by the minor or his guardian within five years after the recording of the deed, nor by the minor within two years after his legal disability is removed, an action by such minor for the recovery of said property is barred by Sections 5547 5549, Comp. Laws 1909."

From the body of this opinion we take the following language, which very clearly and forcefully sets forth the reasoning upon which the doctrine, as set forth in the syllabus of the case, is based. The court there says:

> "The reasoning upon which this doctrine is sustained is stated in *Harlin v. Peck, supra*, in the fol-

lowing language: "There is nothing in the policy or language of the statute which excludes void sales from its operation. The policy of the statute is to quiet titles to real estate sold by order of the probate courts; and, in view of that policy merely, there can be no distinction between sales which may be termed void for the want of jurisdiction and those which are voidable only. Nor is there anything in the language of the statute which creates such a distinction. * * * (If the statute applies only to valid sales), the defendant in every case would be compelled to allege and prove a valid sale before he could invoke the protection of the statute; or, in other words, he must show that he stands in no need of protection in order to obtain protection. * * * We think the statute applies to all sales, void as well as voidable.'"

A late case by the Supreme Court of Oklahoma, to the same effect, and which sums up and adopts a long line of previous decisions, is that of *Sandlin et al. v. Barker et al.*, 95 Okla. 113, 218 Pac. 519, and we particularly direct the Court's attention to subdivision five of the opinion of the Supreme Court of Oklahoma in that case. We quote from this decision as follows:

"As to the contention that the statute of limitation does not run against an administrator's deed, executed in pursuance of a void sale, this court has consistently held that the statute does run in such cases since the decision of this court in *Dodson v. Middleton*, 38 Okla. 763, 135 Pac. 368, by Hayes, C. J., rendered September 22, 1913. This case recognized the conflict among the authorities on the question, and committed this court to the view that Sub-

division 2 of Section 5548, Comp. Laws 1909, which provides:

"'An action for the recovery of real property sold by executors, administrators or guardians, upon an order or judgment of a court directing such sale, brought by the heirs or devisees of the deceased person, or the ward or his guardian, or any person claiming under any or either of them, by the title acquired after the date of the judgment or order, within five years after the date of the recording of the deed made in pursuance of the sale.'

applied, even though the proceedings leading up to the sale, or the sale itself, was void, and the case of *Harlan* v. *Peck*, 33 Cal. 515, 91 Am. Dec. 653, was cited with approval, the following quotation being incorporated in the opinion:

"'There is nothing in the policy or language of the statute which excludes void sales from its operation. The policy of the statute is to quiet titles to real estate sold by order of the probate courts; and in view of that policy merely, there can be no distinction between sales which may be termed void for the want of jurisdiction, and those which are voidable only. Nor is there anything in the language of the statute which creates such a distinction * * * (if the statute applies only to valid sales) the defendant in every case would be compelled to allege and prove a valid sale before he could invoke the protection of the statute; or, in other words, he must show that he stands in no need of protection in order to obtain protection. * * * We think the statute applies to all sales, void as well as voidable.'"

We take the following reference to Oklahoma decisions from the body of this opinion:

"In *Group v. Jones*, 44 Okla. 344, 144 Pac. 377, Section 4655, R. L. 1910, was held to bar an action to recover real estate sold under a void foreclosure sale, and *Dodson v. Middleton, supra*, was followed.

"In *Wray v. Howard*, 79 Okla. 223, 192 Pac. 584, and *Fulp v. Squires*, 77 Okla. 224, 187 Pac. 921, Subdivision 2 of Section 4655, R. L. 1910, was held to be the applicable statute where a minor's property had been sold at a void guardian's sale, but it was held further that by virtue of Section 4656, R. L. 1910, the minor might begin the action to set aside the sale at any time prior to two years after his legal disability was removed.

"In *Glory v. Bagby*, 79 Okla. 155, 188 Pac. 881, the action was brought to set aside a void guardian's deed executed by the guardian of a minor Cherokee Indian, and the court said:

"'Under the facts in this case we see no reason for not allowing the rule heretofore announced by this court in the case of *Dodson v. Middleton*.'"

Various other cases from other states are cited by the Supreme of Oklahoma in this opinion and quoted with approval, but we do not deem it necessary to cite further cases here, as we think that the decision of the Supreme Court of Arkansas placed upon this Arkansas statute before its adoption is controlling and conclusive.

We submit, therefore, that on this point the Supreme Court of Oklahoma erred in reversing the decision of the trial court, and in holding that the Arkansas statute did not operate to bar this right of action.

Proposition Number Three.

Under the provisions of the Federal Statutes and the laws of Arkansas as extended in force in Indian Territory, as construed by the highest courts of Arkansas before the extension of said laws to Indian Territory, the United States Court for the Southern District of Indian Territory had jurisdiction to order and confirm the sale by guardian of the lands involved in this action, and under the provisions of the Federal Enabling Act by which Oklahoma was admitted as a State, and the provisions of the Oklahoma Constitution adopted pursuant to said Enabling Act, the jurisdiction to confirm the sale previously ordered and made under the orders of the United States Court for said Southern District was, with the coming of Statehood, conferred upon and inherited by the County Court of Carter County, Oklahoma, and the Supreme Court of Oklahoma erred in holding that the sale made under the orders of the said United States Court and confirmed by the order of the County Court of Carter County was void.

For the sake of brevity, and to prevent unnecessary repetition, we will discuss under this caption assignments of error numbers 5, 6, 7, 8, 9, 10 and 11, as set forth in the petition for review filed herewith, reserving the privilege of further discussing Sections 10 and 11 under our proposition number five.

The agreed statement of facts, on which this case was tried by the District Court of Murray County, Oklahoma, and which has been copied in full in the Transcript filed herewith and referred to *supra* in this brief, discloses the following facts pertinent to this discussion:

The lands involved in this suit were the tribal allotment of Emma Patterson, a one-fourth blood Mississippi Choctaw Indian; she died May 14, 1906, in the Central District of Indian Territory, leaving surviving her her husband, William M. Patterson, a non-citizen white man, not on the tribal rolls, he being one of the respondents herein, and five children, Doroth A. Patterson, female; Shelby A. Patterson, male; Howell M. Patterson, male; J. Allen Patterson, male, and Ruby E. Patterson, female, all children born of the marriage of the said Emma Patterson with the said William M. Patterson, said children being one-eighth blood Mississippi Choctaw Indians.

William M. Patterson had himself appointed guardian for all of the children hereinbefore named, prior to the admission of Oklahoma as a state; such appointment being made by the United States Court for the Central District of Indian Territory, being the district of the residence of the family at the time of such appointment; the lands involved herein were filed by William M. Patterson as administrator of the estate of Emma Patterson after her death, but prior to the admission of Oklahoma as a state.

The Lands Involved in This Action Were Situated in the Southern Judicial District of Indian Territory.

It is further admitted by said stipulation that on the 24th day of April, 1907, William M. Patterson was

the duly appointed, qualified and acting guardian of all of the other respondents herein, and that on said date he went into the United States Court for the Southern District of Indian Territory, being the district in which the lands were located, and filed his petition to sell said lands; a copy of said petition is attached as Exhibit "A" to the agreed statement of facts. He obtained his order of sale from said court, and this order is attached as Exhibit "B" to the agreed statement of facts.

It is admitted in the stipulation that appraisement was had, notice of sale given and all other proceedings had in accordance with the orders filed in the case.

On the 8th day of October, 1907, William M. Patterson filed in said United States Court his report of sale and petition for order of confirmation, a copy of which is attached to the agreed statement of facts as Exhibit "C", and this report shows a full compliance with all conditions precedent to the sale, and there has never been any contention made by the respondents that these conditions were not complied with, except to assert that the court had no jurisdiction.

This report of sale recites that the lands were sold to this respondent; that the consideration received was equivalent to the full value of said lands; that the money therefor has been paid over by your petitioner to the

said guardian, William M. Patterson, and that a deed has been executed by the said William M. Patterson as guardian in favor of your petitioner, and asks for the confirmation of these proceedings.

This deed was dated on the 5th day of October, 1907, and is attached to the agreed statement of facts as Exhibit "F".

It is further stipulated that your petitioner, U. Sherman Joines, went into possession of said lands, and that he has been in undisputed possession and claiming the ownership thereof ever since the 5th day of October, 1907, and that he now is in possession thereof.

Oklahoma was admitted as a state in the latter part of November, 1907, and it will be noted that all of the proceedings for the sale of this property down to the order of confirmation thereof were had and done in the United States District Court for the Southern District of Indian Territory prior to statehood; statehood then intervened and this proceeding for the sale of these lands was, by the procedure provided by the Constitution and Enabling Act, passed on down to the County Court of Carter County, where it was overlooked and the order of confirmation was not entered until the 5th day of August, 1913, at which time the court acted on the petition previously filed in the United States Court for the

Southern District, and entered its order confirming said sale.

Said order of confirmation is set out as Exhibit "D" to the agreed statement of facts, and it recites on its face that the said County Court of Carter County is the successor in jurisdiction to the United States Court for the Southern District of Indian Territory, to confirm said sale, and it bases its jurisdiction to do so on that ground.

After the entry of this order of confirmation, and on the 5th day of August, 1913, a second deed was executed by the said William M. Patterson, as guardian of the other respondents herein, in favor of your petitioner.

It is admitted that the proceedings for the APPOINTMENT of William M. Patterson as guardian were had prior to statehood in the United States Court for the Central District of Indian Territory, sitting at Durant, in what after statehood became Bryan County, Oklahoma.

It is admitted that all of the proceedings FOR THE SALE OF THE PROPERTY INVOLVED HEREIN BY SAID GUARDIAN were had in the United States Court for the Southern District of Indian Territory, sitting at Ardmore, in what after statehood became Carter

County, Oklahoma, the Southern District of Indian Territory being the district in which the lands sought to be sold were located.

It is admitted that all of the papers pertaining to the appointment of the guardian were, with the coming of statehood, transmitted to the County Court of Bryan County, and all of the papers pertaining to the sale of said lands and on file in the United States Court for the Southern District were transmitted to the County Court of Carter County, and said papers were on file in said county at the time of the confirmation of said sale by the County Court of Carter County.

The fourteenth paragraph of the agreed statement of facts reads as follows:

"That appraisers were appointed, appraisement was had, bonds were filed, notices were given and sale was held, reports were filed, deeds were executed and confirmation was had at the times, places and in the manner in the orders, reports, deeds and judgment, attached hereto as exhibits, ordered set forth and recited."

By reference to these various documents, a more comprehensive knowledge of these proceedings can be had.

The judgment of the trial court, as we have previously seen, was to the effect that the United States Court for the Southern District of Indian Territory had juris-

diction to make the sale, and that the County Court of Carter County inherited that jurisdiction and had jurisdiction to confirm the sale. This judgment was originally affirmed by the Supreme Court of Oklahoma, but the final judgment of the Supreme Court of Oklahoma on rehearing was, in effect, to deny the jurisdiction of the United States Court for the Southern District to make the sale, and to deny the jurisdiction of the County Court of Carter County to confirm such sale, and said opinion further holds that it would have been necessary that the original sale made under the orders of the United States Court for the Southern District of Indian Territory be confirmed within one year from date of sale, and that the date of the sale would be the date of the order of confirmation, instead of the order of confirmation becoming effective as of the date of the sale.

In all of these holdings we believe that the Supreme Court of Oklahoma has erred.

Jurisdiction of United States Court for Southern District of Oklahoma.

The Congress of the United States, by the Act of May 2, 1890 (26 Stat. 81), extended in force in Indian Territory Chapter 73 of Mansfield's Digest of the laws of the State of Arkansas, and it was this chapter of Mansfield's Digest which governed the appointment of guardians and guardianship sales in Indian Territory at

the time of the appointment of William M. Patterson as guardian, and at the time when the proceedings for the sale of the property herein were had.

Inasmuch as the validity of the appointment of William M. Patterson as guardian is conceded by both parties, that phase of the case will not be discussed.

The first question which presents itself, and which must be determined in order that the Court may arrive at a judgment herein, is this: "Did the United States Court for the Southern District of Indian Territory have jurisdiction, under the chapter of the laws of Arkansas previously mentioned, to order this sale?"

We think that on this point there can be no question.

It will be borne in mind by the Court that the lands involved herein were located in the Southern District of Indian Territory.

Sections 3509, 3510 and 3511 of Mansfield's Digest, being a portion of Chapter 73 hereinbefore referred to, read as follows (italics ours):

> "Sec. 3509. When it shall appear that it would be for the benefit of a ward that his real estate, or any part thereof be sold or leased, and the proceeds put on interest, or invested in productive stocks, or in other real estate, his guardian or curator may sell or lease the same accordingly *upon obtaining an*

order for such sale or lease from the court of probate of the county in which such real estate, or the greater part thereof shall be situate.

"Sec. 3510. To obtain such order, the guardian or curator shall present to the court a petition setting forth the condition of the estate and the facts and circumstances on which the petition is founded.

"Sec. 3511. If, after a full examination on the oath of creditable and disinterested witnesses, it appears to the court that it would be for the benefit of the ward that the real estate, or any part of it, should be sold or leased, the court may make an appropriate order for such sale or lease, under regulations and conditions, subject to the provisions of this chapter in relation to the sale of real estate of minors, as the court shall consider suited to the case, first requiring the guardian or curator to enter into good and sufficient bonds to make such leases and conduct such sales with fidelity to the interest of his ward and faithfully to account for the proceeds of such sale and leases according to law and as the order of the court may require."

It will be noted from the reading of the foregoing portions of Chapter 73 of Mansfield's Digest of the Laws of Arkansas that the guardian is to go into the county where the lands are located, as distinguished from the county in which the guardianship proceeding itself may be pending and obtain an order for the sale of the lands of his wards from the probate court of that county, and not from the court of the county in which the guardian may have been appointed.

It will be further noted that it is this Court which is

to make a full examination of witnesses and determine whether or not it is advisable to sell the property, require the necessary bond and conduct the proceedings generally in the case.

We assume that it was thought by the framers of this legislation that the court of the county in which the lands were located would in all probability be more familiar with their value, and consequently that it would be in a position to order and direct the sale to better advantage than would a court in some distant county.

Fortunately, this Arkansas statute was construed by the Supreme Court of the State of Arkansas prior to its adoption and extension in force in Indian Territory, and we here again assert that this construction was adopted along with the statute itself, and we again respectfully direct the court's attention to the authorities cited in our discussions of proposition number five.

This construction was had in the case of *Reid et al. v. Hart*, 45 Ark. Rep. 41. This decision was handed down in the May term of 1885, while the statute was adopted in Indian Territory on May 2, 1890.

We take the liberty of quoting the following extracts from the body of this opinion (the italics, with the exception of the first, are ours):

"There had, however, been provisions made for

the sale of lands, on the application of administrators and executors, for the payment of debts. They were adopted early in our state history, being found in the Revised Code (Sec. 147), and remained in force until the adoption of the Civil Code of 1868. They required that the application for such an order should be made to the probate court of the county *in which the lands are situate*. The Act of Dec. 23, 1846, enlarged the scope of purposes for which such sales might be made and associated 'guardians' with personal representatives (*ubi supra*), but made no change as to the tribunal. It may fairly be inferred that, by this association, the legislature contemplated that guardians should conform to the same rule, and make their applications for the sale of lands in the county where they lay. This view derives strength from a supplemental or cumulative act on the same subject, approved January 17, 1855 (Gould's Digest, p. 135), in which guardians are again grouped with personal representatives, and it is provided that the sales shall be ordered whenever it is made to appear to the satisfaction of the probate court of *'the proper county.'* * * * *The idea that applications for sales by guardians should be made to the forum where the lands lie seems to have survived the code.* At a session of the Legislature held in November, 1868, the passage of some chapters of what was intended to be a general code of laws was attempted. By the 23d section of the chapters on 'curators, guardians and wards,' it was provided that real estate of minors might be sold, whenever it might appear to be for his benefit to do so in order that the proceeds might be re-invested; and that his guardian or curator might obtain an order for the purpose 'from the circuit court of the county in which such real estate, or the greater part of it, might be situated.' This 'Digest,' as it was called, did not take effect, having been rejected by

this Court on constitutional grounds affecting the mode of its adoption. *Vinsant* v. *Knox*, 27 Ark. 266, but it is indicative of the prevalent legislative sense, at the time, of the proper practice, or rather the better policy, as to the forum to be adopted in such cases. It is noteworthy, too, that five years afterwards, by act of April 22, 1873, the same section was re-enacted. Pamphlet Acts of 1873, p. 194. This last statute, it is true, did not affect this sale, which was ordered in 1871, but it goes somewhat to fortify the idea that the continued policy for the state was and had been to leave the jurisdiction in such matters, where, by strong inference at least, it had been originally placed by the act of 1846. *This is law to this day, and has been brought forward into Mansfield's Digest, Sec. 3509. This displays a system by which we endeavor to supply the omission in the act of 1846, which fails to designate the probate court meant, by reasoning from the organic unity of the whole system.*"

We have, then, not only the Arkansas statute which is plain and unequivocal in its terms, but the construction of that statute by the highest tribunal of the State of Arkansas prior to its adoption and extension in force in Indian Territory, and it would appear that there can be no question but that the jurisdiction was in the Arkansas county in which the lands were situated, and not in the county in which the guardian himself might have been appointed.

Now, with this fact in mind, we again call the court's attention to the provisions of the Congressional Enact-

ment of May 2, 1890 (26 Stat. 81), extending the aforesaid Arkansas Statute in force in Indian Territory, and especially do we direct the court's attention to the provisions of Sections 30 and 32 of said act. Section 30 subdivides Indian Territory into three judicial divisions, designating them as the first, second and third divisions.

By the subsequent act of March 1, 1895 (28 Stat. 693), the names of these divisions were changed to the Northern, Central and Southern Judicial Districts, and their jurisdiction more clearly defined and it was these United States Courts which had jurisdiction in applying these Arkansas guardianship laws in Indian Territory.

Section 32 of said Act of May 2, 1890 (26 Stat. 81), specifically provides that the word "*county*" as used in any of the laws of Arkansas which are put in force in Indian Territory by the provisions of said act, and this includes Chapter 73 of Mansfield's Digest, shall be synonomous with the words "*Judicial Division*" in Indian Territory. This section reads as follows:

> "That the word 'county,' as used in any of the laws of Arkansas which are put in force in the Indian Territory by the provisions of this act, shall be construed to embrace the territory within the limits of a judicial division in said Indian Territory; *and whenever in said laws of Arkansas the word 'county' is used, the words 'judicial division' may be substituted therefor, in said Indian Territory, for the purposes of this act.*

> "And whenever in said laws of Arkansas the word 'State,' or the words 'State of Arkansas' are used, the word 'Territory' or the words 'Indian Territory,' may be substituted therefor, for the purposes of this act, and for the purpose of making said laws of Arkansas applicable to the said Indian Territory.
>
> "But all prosecutions therein shall run in the name of the 'United States.'"

In the case of *McHarry* v. *Eatman*, 29 Okla. 46, 116 Pac. 935, the Supreme Court of Oklahoma, in construing Chapter 73 of Mansfield's Digest of the Laws of Arkansas, which we now have under consideration, and in applying the same to Indian Territory, uses this language:

> "Prior to statehood there were no county divisions or county government in the eastern part of the state of Oklahoma, then known as the 'Indian Territory.' Under the court government of that country then existing, the territory was divided into judicial districts, which corresponded to county divisions of the State of Arkansas, at least as far as the jurisdictions of the courts were concerned."

This last mentioned case further holds that the United States Court for the Southern District of Indian Territory would even have had power to appoint a guardian for the minor children of Emma Patterson, because their land was situated in the Southern District. On this point, we take the following language from this opinion:

> "It is a matter of common knowledge that in the division of the property of the Five Civilized

Tribes, the children taking an equal part thereof with the parents, a large per cent of the property in the eastern district of the state was, and is now, owned by minors, and that the domicile of the minor and the location of his allotment or estate is often widely separated. This condition, of course, brought the question squarely to the court as to whether it would not be more economical and less expensive to the estate of the minor to appoint curators or guardians for his estate in the district where his land was located. There was nothing in the statute expressly forbidding that this be done, and these conditions doubtless gave rise to the practice."

As showing the intent of Congress that the Arkansas county divisions and the Federal judicial district divisions in Indian Territory should be construed as synonmous in applying the laws of Arkansas to Indian Territory, we direct the Court's attention to another Act of Congress, that of February 19, 1903 (32 Stat. 841), extending Chapter 27 of Mansfield's Digest of the laws of Arkansas in force in Indian Territory, where it is again said:

> *"That wherever in said chapter the word 'county' occurs there shall be substituted therefor the word 'district,' and wherever the words 'state' or 'State of Arkansas' occur there shall be substituted therefor the words 'Indian Territory.'"*

We further direct the Court's attention to the Act of Congress of April 28, 1904 (33 Stat. 573), from which we quote as follows:

"All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estate in said territory, whether Indian, freedman or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen or otherwise."

See also the case of *James E. Whitehead* v. *James O. Galloway et al.*, 249 U. S. 79, 63 L. ed. 490.

In the light of the foregoing statutes and authorities, we respectfully submit that there can be no question of doubt but that the United States Court for the Southern District of Indian Territory had full power and authority to order, direct and confirm the sale of the lands involved herein, and that it was the only court which did have such power prior to the admission of Oklahoma as a state.

Jurisdiction of County Court of Carter County, Oklahoma, to Confirm Sale.

The question which now presents itself for our consideration is this:

"Did the County Court of Carter County, with the coming of statehood, acquire jurisdiction to confirm the sale previously made under the orders of the United States Court for the Southern District of Indian Territory?"

We contend that it did; the trial court held that it did; the Supreme Court first held that it did, but on final rehearing held that it did not, and in this holding we believe that it erred.

The Supreme Court of Oklahoma, in its holding, took the position that this jurisdiction was inherited by the County Court of Bryan County, Oklahoma, and that the jurisdiction so inherited was exclusive of the jurisdiction of every other county in the State of Oklahoma.

We respectfully submit that in so holding it erred.

In determining this question we must look to the provisions of the Federal Enabling Act and of the Constitution of Oklahoma, adopted pursuant thereto, under which Oklahoma was admitted as a state.

As we have already seen, this proceeding for the sale of these lands was pending in the United States Court for the Southern District of Oklahoma prior to statehood, and the entire proceeding had been completed when statehood intervened; even the petition for confirmation had been filed, and upon this petition the County Court of Carter County later acted in entering its order confirming that sale.

We contend that the Enabling Act and the provisions of the constitution provided and adopted a comprehensive plan for the transfer of all proceedings

pending in the courts of the United States in Indian Territory prior to statehood, to the courts of the State of Oklahoma, their successors in jurisdiction, and that the procedure so provided was mandatory and left no jurisdiction whatever in the agencies provided for the transmission of these cases to adopt or provide another or different procedure, or to send the pending cases to another or different jurisdiction from that provided in this procedure.

This necessarily was true, because any other procedure must necessarily have resulted in endless confusion in determining what courts should have jurisdiction, and how that jurisdiction should be acquired.

The procedure to which we refer is set out in Sections 19 and 20 of the Enabling Act, by which Oklahoma was admitted as a state (34 Stat. 267), and by the preamble and Sections 1, 2 and 23 of the Schedule to the Constitution of the State of Oklahoma, and these provisions were necessarily construed by the Supreme Court of Oklahoma in arriving at its determination that the County Court of Carter County did not take jurisdiction. As a matter of fact, the opinion specifically mentions Section 19 of the Enabling Act, and Section 23 of the Schedule to the Constitution.

The provisions of the Enabling Act, to which we have referred, read as follows:

"Sec. 19. That the courts of original jurisdiction of such state shall be deemed to be the successor of all courts of original jurisdiction of said territories and as such take and retain custody of all records, dockets, journals and files of such courts, except in causes transferred therefrom, as herein provided; the files and papers in such transferred cases shall be transferred to the proper United States Circuit or District Court, together with a transcript of all book entries to complete the record in such particular case so transferred.

"Sec. 20. That all causes, proceedings and matters, *civil or criminal, pending in the district courts of Oklahoma Territory, or in the United States courts in the Indian Territory, at the time said territories become a state*, not transferred to the United States Circuit or District Courts in the State of Oklahoma, *shall be proceeded with, held and determined by the courts of said state, the successors of said district courts of the Territory of Oklahoma*, and the United States courts of the Indian Territory, with the right to prosecute appeals or writs of error to the supreme or appellate court of said state, and also with the same rights to prosecute appeals or writs of error from the final determination in such cases made by the supreme or appellate court of such state to the Supreme Court of the United States, as is provided by law for appeals and writs of error from the supreme or final appellate court of a state to the Supreme Court of the United States. All criminal cases pending in the United States Courts in the Indian Territory, not transferred to the United States Circuit or District Courts in the said State of Oklahoma, shall be prosecuted to a final determination in the state courts of Oklahoma, under the laws now in force in that territory."

The provisions of the Constitution of the State of

Oklahoma, to which we refer, are set forth in the following language:

"In order that no inconvenience may arise by reason of a change from the forms of government now existing in the Indian Territory and in the Territory of Oklahoma, it is hereby declared as follows:

"Section 1. No existing RIGHTS, ACTIONS, SUITS, proceedings, contracts or claims shall be affected by the change in the forms of government, but all shall continue as if no change in the forms of government had taken place. And all processes, which may have been issued previous to the admission of the state into the Union under the authority of the Territory of Oklahoma, or under the authority of the laws in force in the Indian Territory, shall be as valid as if issued in the name of the state.

"Section 2. All laws in force in the Territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law.

* * * * * * *

"Section 23. When this constitution shall go into effect the books, records, papers and proceedings of the probate court in each county, and all causes and matters of administration and guardianship, and other matters pending herein, shall be transferred to the county court of such county, except of Day County, which shall be transferred to the County Court of Ellis County, *and the county courts of the respective counties shall proceed to final decree or judgment, order or other termination in the said several matters and causes as the said probate*

court might have done if this Constitution had not been adopted. The district court of any county, the successor of the United States Court for the Indian Territory, in each of the counties formed in whole or in part in the Indian Territory, shall transfer to the county court of such county all matters, proceedings, records, books, papers and documents appertaining to all causes or proceedings relating to estates: Provided, that the legislature may provide for the transfer of any of said matters and causes to another county than herein prescribed."

see also sec. 27

It is only necessary to read the foregoing provisions to determine that they fully cover and provide for the transfer of cases such as this now before the Court.

Under this procedure there was no option whatever in the United States Court for the Southern District of Indian Territory as to where it would transfer the causes pending before it. With the coming of statehood this court sat at Ardmore, Oklahoma, and under this procedure it passed the jurisdiction of this case to the district court, which in turn, under the provisions of the same acts, handed the probate jurisdiction on down to the County Court of Carter County.

By this course the case at bar was transmitted to the County Court of Carter County, and with it were transmitted all of the papers pertaining to the sale of this property. Under this procedure there was no place else to send them.

The Court can readily see the confusion which would have arisen if any option had been left in either the United States District Court or the State District Court to hand these cases down in any manner other than by a fixed and arbitrary procedure.

Exactly the same procedure governed the United States Court for the Central District of Indian Territory in passing down the papers pertaining to the appointment of William M. Patterson as guardian; the papers pertaining to the *sale were not in the Central District and could not be handed down by the Federal Court of that district to its successor.*

The only proceeding which was ever pending in the Central District was the proceeding for the *appointment* of Patterson as guardian of his minor children, and these papers were, by the procedure here provided, arbitrarily handed down from the United States Court of the Central District to the District Court of Bryan County, and by it passed on down to the county or probate court of that county.

So that by the procedure provided by Congress in the Enabling Act aforesaid, and the procedure outlined in the constitution, accepting said Enabling Act, we find that with the coming of statehood one branch of this proceeding was automatically placed in the County

Court of Bryan County, while another was by the same procedure placed in the County Court of Carter County, Oklahoma.

We do not contend that this procedure gave to the County Court of Carter County, Oklahoma, equal jurisdiction in all things in this guardianship proceeding with the County Court of Bryan County, Oklahoma, because its successor, the United States Court for the Southern District of Indian Territory, never had equal jurisdiction. *What it did have, however, was the sole and exclusive jurisdiction to complete this guardianship sale, and that jurisdiction was, by the procedure herein pointed out, transmitted to its successor, the County Court of Carter County, Oklahoma.* When that jurisdiction was exercised by the confirmation of the sale previously ordered by its successor, the jurisdiction of the County Court of Carter County, Oklahoma, was terminated, but it was not terminated until it had exercised that jurisdiction.

Congress realized that this procedure would result in transferring certain pending cases to courts other than those which would have had jurisdiction, had the cases been filed as new proceedings after statehood, and so did the Constitutional Convention, which drafted the Constitution of Oklahoma, accepting the provisions of the Enabling Act, have this in mind.

This is shown by the fact that in the last portion of Section 23 of the Schedule to the Constitution we find the following language:

> "The district court of any county, the successor of the United States Court for the Indian Territory, in each of the counties formed in whole or in part in the Indian Territory, *shall transfer* to the county court of such county all matters, proceedings, records, books, papers and documents appertaining to all causes or proceedings relating to estates: *Provided, that the legislature may provide for the transfer of any of said matters and causes to another county than herein prescribed.*"
> The italics in the above quotation are ours.

We have specifically directed the Court's attention to this provision, because it shows conclusively that it was fully realized that situations such as this would arise, and a means was provided whereby the proceeding could be transferred to the court that would have had jurisdiction had the proceeding been filed after statehood, should the legislature see fit to make provisions therefor. The court will note that this transfer was not to be made automatically, but the legislature was merely given power to provide for such a transfer.

In 1908 the Legislature of Oklahoma enacted a law which provided a means for the transfer of such cases, but this law was not self executing; it merely provided that any one interested in the proceeding might go into the county court to which the cause was transferred and

file his petition with that court for the transfer of the cause to some other court, and if no one ever filed such a petition the cause continued in the jurisdiction to which it was transferred by the provisions of the Enabling Act and Constitution.

This was so held in the case of *Eaves* v. *Mullen*, 25 Okla. 679, 107 Pac. 433. From the opinion in which case we quote at length as follows:

> "Counsel for plaintiff in error, however, contends that the jurisdiction of the County Court of Carter County, over the guardianship proceedings involved in this cause, had, prior to the order of sale thereon, been terminated by two certain acts of the legislature. Section 1 of an act of the legislature approved December 21, 1907-8, p. 205, as amended by an act of the legislature approved March 12, 1908 (Sess. Laws 1907-8, p. 212), provides: 'That all those civil cases transferred from the courts of the Territory of Oklahoma *and the United States Court in the Indian Territory to the courts of this state as transferred by Act of Congress and accepted by the constitution, which would have been properly triable in any court, or county or district of this state, had such suit or proceeding been commenced after the admission of this state into the Union, including records formerly belonging to the United States Commissioners' courts and all papers of mayors of cities and* incorporated towns having and exercising an ex officio jurisdiction as United States Commissioners in that part of the state formerly known as the Indian Territory, that may be in the hands of the clerks of the various district courts of that portion of the state, *may, including probate matters, by any*

person having a substantial interest therein, on petition verified by the affidavit of the applicant or his attorneys of record, filed with the judge or clerk of the court where such cause is pending within sixty days after the passage and approval of this act, be transferred to the proper courts of such county or district, and that all books, records, pending cases, papers, proceedings, liens, judgments and executions pending in a justice of the peace court of any county are hereby transferred to some justice of the peace court of the county in which, if originally brought in said court, the defendant lives, or the defendant has property, *and when such records are transferred as above provided for, said court shall have full and complete jurisdiction of all cases and proceedings so transferred;* provided, that all transfer of cases, papers, books, proceedings, made or attempted to be made by mayors or incorporated towns to the proper court are hereby legalized and made valid.'

"That statute applies to all cases transferred from United States courts of Indian Territory to any of the courts of the state. By specific provisions, it includes probate causes; it authorizes the transfer of any of such cases from the court wherein it was pending by reason of the enabling act and the schedule to the constitution to that court which would have had jurisdiction, had the proceeding been instituted since the admission of the state. The transfer is authorized to be made upon application of any person having a substantial interest therein, by petition, verified by his affidavit, or by affidavit of his attorney of record; *but the statute does not make it mandatory on the persons interested to make such application, nor does it provide that the cause shall be transferred without such application.* We cannot therefore concur in the contention of counsel that the effect of this statute was to oust the County

Court of Carter County of jurisdiction. No petition was ever filed by any one with the county court of that county before the application for the order of sale was made, or at any other time so far as the records disclose, asking for a transfer of the cause to the County Court of Johnston County, or of any other county. If it had been intended to provide by this statute that all causes, civil or criminal, shall be transferred to the county that would have had jurisdiction if they had been instituted since the admission of the state, why was the transfer authorized to be made only upon application of 'any person having a substantial interest therein,' or the criminal cases 'upon the application of the defendant therein'? If it had been intended that the court in which any such cause was pending should have no further jurisdiction therein after the passage of the act, except to transfer it, we think the legislature would have provided that the transfer of such cases should be made by the court upon it appearing from any source that such cause was one that would have been cognizable in the court of another county, if it had been instituted since statehood.

"The amendatory act, also by language very similar to the language of Section 1, further provides for the transfer of criminal cases from the court of any county or district in which the same is pending to the court of a county or district in which the case would have been properly triable if it had been commenced after the admission of the state. If it was intended that the courts in which these civil and criminal proceedings were pending should lose all jurisdiction thereof, whether application for a transfer was made or not, then these acts placed it within the power of each defendant in a criminal case to defeat the prosecution against him, because the court is not authorized to make the transfer except upon this application. The defendant would be able to

free himself from prosecution. *We think no such meaning can be attributed to these statutes, but that it was intended only to give the parties interested in civil and criminal causes the opportunity to have them proceeded with and finally determined, either in a court of the county or district in which the said cause has been transferred by the provisions of the Enabling Act, and of the Constitution, or in the court of the county in which it should have been instituted if it had originated since statehood, according as the convenience and interest of the parties interested might lead them to choose.*"

This case clearly supports our contention that until, and unless, a petition for the transfer of this proceeding now under consideration from the County Court of Carter County, Oklahoma, to the County Court of Bryan County, Oklahoma, was filed by some interested party, and the cause transferred before the exercise by the County Court of Carter County, Oklahoma, of its jurisdiction to confirm, that such jurisdiction continued in said court. No such petition was filed, and the jurisdiction was still in said court at the time of the entry of the order of confirmation.

The provisions of both the Enabling Act and the Constitution clearly show that it was the intent and purpose that all proceedings pending in the United States courts should be transferred to the courts of the state, their successors in jurisdiction, with as little confusion as possible, and to this end the exact procedure for the

transfer of these causes is provided, and the courts which are to have jurisdiction after statehood are specifically pointed out. To use the phraseology of the Preamble to the Constitution, we have the following language:

> "In order that no inconvenience may arise by reason of a change from the forms of government now existing in the Indian Territory and in the Territory of Oklahoma, it is hereby declared as follows:"

Then follows Section 1 of the Constitution to the following effect:

> "No existing RIGHTS, ACTIONS, SUITS, proceedings, contracts or claims shall be affected by the change in the forms of government, but shall continue as if no change in the forms of government had taken place."

The Enabling Act is in the nature of a proposition setting forth the terms upon which these proceedings may be transferred, while the provisions of the Constitution constitute an acceptance of those terms; the two, in effect, constituting a contract between the State and the Nation.

If no change in government had taken place, the United States Court for the Southern District of Indian Territory would have confirmed the sale of the property herein, and the title of your petitioner would have been absolute. When the change in government occurred, automatically transferring the jurisdiction of this court to

the County Court of Carter County, Oklahoma, unquestionably the county court of that county inherited the jurisdiction to complete the proceeding by confirming the sale, otherwise Section 1 of the Constitution, quoted *supra*, to the effect "that all pending actions shall proceed as though no change in government had taken place" is meaningless; for how can it be said that existing rights, actions, suits or proceedings are not affected, if the very agency provided by those provisions of the Constitution and Enabling Act to complete the pending proceeding be now held to have no such power, and if its orders, made in an effort to complete such proceedings, are now held to be a nullity.

The County Court of Bryan County, Oklahoma, could not have inherited the jurisdiction to complete this sale under the procedure laid down by the Enabling Act and Constitution, because, as we have previously seen, its predecessor, the United States District Court for the Central District of Indian Territory itself had no such jurisdiction, and it certainly could not transmit to its successor a greater and broader jurisdiction than it had.

The only way that the County Court of Bryan County could acquire jurisdiction to complete this proceeding was by transfer of this branch of the proceeding from the County Court of Carter County, Oklahoma; no such

transfer was ever had until long after the order of confirmation was entered by the County Court of Carter County, Oklahoma.

The Supreme Court of Oklahoma, in the case of *Dewalt v. Cline*, 35 Okla. 197, 128 Pac. 121, speaking through Judge Williams, now United States District Judge for the Eastern District of Oklahoma, in interpreting Section 23 of the Schedule to the Constitution, quoted *supra* says:

> "Section 23 of the schedule, *supra*, contemplated that such pending probate proceedings should continue to final determination just as if there had been no change in the form of government."

The proceedings for the sale of the lands involved herein by guardian were, at the time of the admission of Oklahoma as a state, pending in the United States Court for the Southern District of Indian Territory, and in no other district. This Court sat at Ardmore in what after statehood was Carter County, Oklahoma.

Under this state of facts, the decision of the Supreme Court in the case of *Bailey v. Jones*, 96 Okla. 56, 220 Pac. 345, is applicable. We take the following language from the decision of the court in this case:

> "A county court, to which had been transferred an administration proceeding that would have been properly triable in the court of another county, had such proceeding been instituted since the admission

of the state, was not by reason of the act of the legislature approved March 12, 1908 (Sess. Laws 1907-8, p. 212; Comp. Stat. 1921, Sec. 3168), ousted of jurisdiction of said proceeding where no application for a transfer thereof was ever made by any of the parties having a substantial interest therein.

"An administration proceeding, pending in one of the United States courts of the Indian Territory at the time of the admission of the state into the Union, was, by virtue of the Enabling Act, Sec. 19 (34 Stat. 277), and Schedule of the Constitution, Section 23, transferred to the county court of the county in which was located the court in which said proceeding was pending."

See, also, *Eaves v. Mullen*, 25 Okla. 679, 10 Pac. 433, and *Davis v. Carothers*, 22 Okla. 325, 97 Pac. 581.

As we have previously said, it is our contention that the provisions of the Enabling Act and the Constitution, governing the transfer of these pending proceedings, are *mandatory*.

Quoting again from Section 23 of the Constitution of the State of Oklahoma, we find this language (italics ours):

"The District Court of any county, the successor of the United States Court for the Indian Territory, in each of the counties formed in whole or in part in the Indian Territory, *shall transfer to the county court of such county all matters, proceedings, records, books, papers and documents appertaining to all causes or proceedings relating to estates.*"

We contend that the foregoing quotation left no option whatever in the District Court of Carter County as to where it would transfer this Patterson guardianship case when the United States Court for the Southern District of Indian Territory handed it over to it, but that it made it absolutely mandatory on that court to pass the proceeding on down to the County Court of Carter County, Oklahoma.

In this position we are sustained by the decision of the Supreme Court of Oklahoma in the case of *Davis v. Carathers*, 22 Okla. 323, 97 Pac. 581, from which we take the following language:

> "The District Court, as the successor of the United States Court in the Indian Territory at Sapulpa, had no original probate jurisdiction whatever, and had no authority to continue to administer probate matters, except on appeal to such court. *The provisions of Section 23 of the Schedule, supra, are mandatory upon the District Court, as the successor of said court in such county in which the United States Court was located, to transfer to the County Court of said county all matters, proceedings, books, records, papers and documents pertaining to all original causes or proceedings relating to estates.*"

See, also, *Board of Commissioners v. Coler & Co.*, 180 U. S. 506, 45 Law ed. 643, holding that the construction is binding on the United States Courts.

There had been no proceedings in the United State

Court for the Judicial District of Indian Territory relating to the sale of this land, there were no papers or documents pertaining to the said sale in the files of that court; in fact, it had no jurisdiction in order to make the sale, or to confirm it after it was made; that certainly there was no procedure provided by the Constitution and Enabling Act by which that court could transfer a proceeding over which it had no jurisdiction to the County Court of Bryan County; there was no procedure by which the County Court of Bryan County could get the papers and documents pertaining to this guardianship, provided by the Constitution and Enabling Act, it is not to be supposed that the Enabling Act and the Constitution contemplated that proceedings of this nature would simply be abandoned in midstream, because Section 1 of the Constitution, quoted supra, says, "That they shall continue as though no change in the form of government had taken place."

Now, this being true, and the law having specifically placed the case in the County Court of Carter County, where was the case to continue as though no change in the form of government had taken place if not in the court to which it had been thus transferred?

If, as we think, it makes no difference how many courts had jurisdiction of different branches of this guardianship proceeding before statehood, each

court transmitted to its successor in the manner provided by law the jurisdiction which it possessed, or rather the branch of the proceeding pending in it, and it seems to us that the provisions of the Constitution and Enabling Act would be utterly ineffective if the courts to which these branches of these proceedings were transferred did not succeed to the same jurisdiction of their predecessors.

After this particular proceeding, which was pending in the United States Court of the Southern District with the coming of statehood, and which was transferred to the County Court of Carter County, was finally terminated by the entry of the order of confirmation, the County Court of Carter County automatically ceased to have any further jurisdiction over the estate of said minors; *its jurisdiction being only an ancillary jurisdiction to complete the pending proceeding which was cast upon it by the provisions of the Constitution and Enabling Act, it ceased to have any further jurisdiction the moment that function had been performed and that pending sale had been confirmed.*

We respectfully submit that the court erred in concluding that the County Court of Carter County, Oklahoma, did not succeed to the jurisdiction of the United States Court for the Southern District of Indian Territory to confirm the sale made under the order of that court.

Not Necessary That Sale Be Confirmed Within One Year From Date of Order.

There is one other phase of this opinion of the Supreme Court of Oklahoma, dealing with the subject of the confirmation of this sale, which we deem it necessary to notice, and that is this:

The Supreme Court of Oklahoma in its opinion holds that it was necessary that there be a sale of this property within one year after the order of sale was sued out in the United States Court for the Southern District of Oklahoma, and that inasmuch as the confirmation of the sale was not had or made by the County Court of Carter County until more than one year after the date of the order of sale, that there was no sale within a year, and that the sale would be considered as having been made on the date of the order of the confirmation, instead of the order of confirmation becoming effective as of the date of the sale.

The agreed statement of facts, and the exhibits thereto attached, upon which this case was tried, show that the order of sale was issued out of the United States Court for the Southern District of Oklahoma on the 2nd day of May, 1907; that the sale was made under said order on the 5th day of July, 1907; that the first deed was executed on the 5th day of October, 1907, and that the report of sale and petition for confirma-

tion was filed in that court on the 8th day of October, 1907.

The fact is that more than a year elapsed after the date of the order of sale before the sale was confirmed.

The Supreme Court of Oklahoma arrives at this opinion by attempting to apply to this situation Section 1479 of the Compiled Oklahoma Statutes of 1921, which reads as follows:

> "Order in force for one year. No order of sale granted in pursuance of this article (Chapter) continues in force more than one year after granting the same, without a sale being had."

But we respectfully submit that this statute is wholly inapplicable to this case, for the reason that Section 1 of the Constitution, quoted *supra*, says, "that this pending proceeding shall continue to completion as though no change in government had taken place," and how could it be said that this pending proceeding did continue to completion *as though no change in government had taken place if a statute of Oklahoma enacted after statehood be construed to relate back and govern the completion and confirmation of this sale?*

We respectfully submit that in arriving at its conclusion on this point the Supreme Court erred, and that there are two insurmountable obstacles which preclude

the possibility of its conclusion on this point being correct.

The first one is "that the Supreme Court of Oklahoma has overlooked the fact *that the sale in question was had under and pursuant to the provisions of Chapter 73 of Mansfield's Digest of the laws of Arkansas*, and not under and pursuant to the laws of the State of Oklahoma.

The second, and even more conclusive reason is "that if the section referred to by the Supreme Court of Oklahoma in its opinion was at all applicable to this sale, it would in no manner affect the same, *for the reason that a sale was had within one year after the entry of the order directing the sale*, and both the deed and order of confirmation so recite.

As we have previously seen, this entire guardianship sale had been completed in the United States Court for the Southern District of Indian Territory, under Chapter 73 of Mansfield's Digest of the Laws of Arkansas as extended in force in Indian Territory prior to statehood, and only one act remained to be done to complete title, and that was the confirmation of the sale.

The provisions of the Constitution and Enabling Act, cited *supra*, say "that this proceeding shall be con-

pleted as though no change in government had taken place," and there is not one line in the statutes of Arkansas which provide that an order of confirmation shall be entered within any specific period of time after the order of sale shall have been sued out, but there are numerous decisions holding that the order of confirmation when made, relates back and becomes effective as of the date of the sale.

We direct the Court's attention to the case of *Brack v. Macon*, 90 Ark. 324, 13 S. W. 458, and the cases there cited.

But, as we have previously pointed out, this sale actually did take place within one year after the entry of the order directing the sale. As a matter of fact, the entire proceeding, down to and including the filing of the report of sale and petition for order of confirmation, was completed during the period from April, 1907, to October, 1907, and the only way that the Supreme Court of Oklahoma could arrive at its decision was to hold that there was no sale until the order of confirmation was entered and that the sale took place as of that date, instead of holding that the order of confirmation related back and became effective as of the actual date of sale.

This holding is in absolute conflict with the former

decisions of the Supreme Court of Oklahoma not herein overruled, and absolutely inconsistent therewith.

We direct the court's attention to the former decisions by the Supreme Court of Oklahoma on this subject, in the case of *Hickory et al. v. Campbell et al.*, 75 Okla. 79, 182 Pac. 233, from which we take the following language:

> "The court, in hearing the issue whether or not the value of the land sold is disproportionate to the amount of the bid, should confine the evidence as to its value on day of sale, and not as of its value on day of confirmation."

See also the case of *Shoals F. Freeland*, 91 Okla. 238, 217 Pac. 176, where the Supreme Court of Oklahoma uses this language:

> "In a guardian's sale of an interest in oil and gas royalties, the successful bidder is bound by the bid, and after confirmation of the sale is liable to pay the amount of the bid, even if there is a depreciation in the value before the order of confirmation is entered of record and before guardian's deed is executed."

In the last mentioned case the Supreme Court of Oklahoma refers to the case of *Morrison v. Burnette*, by the United States Circuit Court of Appeals for the Eighth Circuit, 154 Fed. 617, and adopted the decision of that court, and from that decision we quote as follows:

> "A successful bidder under an order or decree

of court at a sale which is subject to confirmation by the court, is a purchaser from the announcement of the sale to him by the officer, and may thereafter be compelled to complete his purchase."

The opinion further uses this language:

"On the other hand, the rule is without exception in the national courts, and it has been very generally adopted in the state courts, that the bidder at a sale by a master or receiver, under an order or decree which contemplates a subsequent report and confirmation of sale, becomes a purchaser when the officer announces the sale to him. Thereafter he is liable for and may be compelled to pay the purchase price which he bids. Thereafter he may be made to pay for the destruction or depreciation and may be permitted to reap the proceeds of the appreciation of the property."

Applying the foregoing rules as laid down by this court and by the United States Circuit Court, there was a sale of this property by Patterson to U. Sherman Joines, petitioner, the moment that the property was knocked down to him as the highest bidder.

We believe the Supreme Court of Oklahoma to be wholly in error in holding that this sale, had under the Arkansas Law in force in Indian Territory, must have been confirmed within one year.

The law on this subject generally is laid down in Section 95 at page 132 of Volume 16 of Ruling Case Law, dealing with the subject of judicial sales and the

confirmation thereof. This rule is laid down in the following language:

> "By the weight of authority, the confirmation of a judicial sale relates back to the day of the sale and passes title as of that day, the purchaser being entitled to everything he would have been entitled to if the confirmation and conveyance of title had been contemporaneous with the sale. His rights relate back to the date of sale, and he is then considered the owner from and after that date. So the deed which the judicial officer subsequently gives relates back upon delivery to the time of the contract of sale, which is the substantial thing in the transaction."

See, also:

> *Brock* v. *Money*, 99 Ark. 324, 13 S. W. 458.
> *Smith* v. *Newman*, 146 Ky. 80, 130 S. W. 953.
> *Wagner* v. *Cohen*, 6 Gill (Md.) 97, 46 Am. Dec. 660.
> *Cropper* v. *Brown*, 76 N. J. (Eq.) 406, 74 Atl. 987.
> *Jachnovsky* v. *Velrath*, 70 Ohio St. 340, 53 N. E. 46.

The same authority, Section 64, page 88 of Vol. 16, in dealing with the time within which confirmation shall be made, lays down the law as follows:

> "The fact that many years have elapsed since the judicial sale of land under a decree, without report and confirmation by the court, will not debar the purchaser on the principle of laches from having the court confirm the sale and execute its decree by a conveyance, though the case has been for many years omitted from the court docket, but

without any order of dismissal or discontinuance having been made. So a deed executed by commissioners appointed to sell a tract of land to satisfy a debt was held to vest the grantee with legal title to the property although the deed was not approved and confirmed for about twenty-nine years after the sale. This is the general rule as among the original parties where the rights of third parties have not intervened."

See, also:

McGinnis v. *Caldwell*, 76 S. E. 834-43, L. R. A. (N. S.) 630.
Hazlewood v. *Chrisman*, 62 S. W. 39.
Redus v. *Hayden*, 43 Miss. 614.
Evans v. *Spurgin*, 6 Gratt. 119-52 Am. Dec. 105.

We respectfully submit, therefore, that the Supreme Court of Oklahoma erred in holding that there was no sale in this case until the date of confirmation, and that it further erred in holding that the confirmation must have taken place within one year from the date of the order of sale.

We further submit that the authorities cited under this proposition establish beyond doubt our contention that the United States Court for the Southern District of Indian Territory had jurisdiction to order this sale, and that the County Court of Carter County, Oklahoma, inherited from it the jurisdiction to confirm the same, and that the title of your petitioner to the lands involved herein should, thus originating, be good.

Proposition No. 4.

The Supreme Court of Oklahoma erred in holding that under the provisions of the Federal statutes in force in Indian Territory prior to statehood, and the laws of Arkansas, extended in force in said territory and having the force of Federal statutes therein, that there was an intervening life estate outstanding in William M. Patterson not terminated by the Arkansas Statute of Limitations, as construed by the highest court of Arkansas before its adoption, which outstanding life estate would prevent the running of the Oklahoma two-year statute of limitations as against the respondents, Doroth A. Patterson and Shelby A. Patterson, who attained full age more than two years prior to the filing of this action.

Under this caption we will argue assignments of error Nos. 10 and 11, as set forth in the petition for review filed herewith.

By referring to the answer set forth in the transcript filed herewith and hereinbefore referred to, it will be noted that your petitioner pleads also the Oklahoma statute of limitations as a bar to the maintenance of their action by the respondents. Section 1058 therein referred to reads as follows:

> "Any person entitled to bring an action for the recovery of real property, or who may be under any legal disability when the cause of action accrues, may bring the action within two years after the disability is removed."

The stipulation upon which this cause of action was tried discloses that at the time of the filing of said cause of action Doroth A. Patterson and Shelby A. Patterson,

two of the respondents herein, under whom your petitioner claims, were of full age and had been for a period of more than two years preceding the filing of the action.

In determining that these two respondents were not barred by the Oklahoma statute of limitations, the Supreme Court of Oklahoma decided a Federal question, in that it held that the reason that the action was not barred by the Oklahoma statute was because there was an outstanding life estate in William M. Patterson which had not been terminated and which prevented the running of any statute of limitations as against the other respondents aside from William M. Patterson.

In determining this question, the Supreme Court of Oklahoma necessarily construed the Federal statute of May 2, 1890, and Chapters 20 and 49 of Mansfield's Digest of the Laws of Arkansas extended in force in Indian Territory by said Federal statute, and Section 22 of the Choctaw Chickasaw Supplemental Agreement, 32 Stat. 641, in holding that Patterson had a life estate; and it further construed Chapter 97 of Mansfield's Digest as extended in force by the aforesaid Act of May 2, 1890, in determining that the laws of Arkansas did not operate to terminate such estate.

The inference to be drawn from this decision of

the Oklahoma Supreme Court is that the statute would have operated against Doroth A. Patterson and Shelby A. Patterson had it not been for this intervening life estate outstanding in William M. Patterson by virtue of the Federal statutes and the Arkansas laws.

We have discussed under our Proposition No. 1 the question of the existence of this life estate, and under Proposition No. 2 we have discussed the application of the statute of limitations of Arkansas as set forth in Chapter 97 of Mansfield's Digest, and in so far as it affects William M. Patterson's right to maintain this action we refer to the authorities there cited.

We now desire to discuss the application of Chapter 97 of Mansfield's Digest of the Laws of Arkansas to the theory upon which the Supreme Court of Oklahoma decided that the Oklahoma statute did not run as against those of the respondents who attained full age more than two years before the filing of this suit.

As we have previously said, and as the opinion itself discloses, this holding was based on the theory that there was outstanding in William M. Patterson a life estate by curtesy, and that so long as this life estate was outstanding no statute of limitations would operate as against the other respondents herein. Clearly, if there was no life estate outstanding in William M. Pat

terson, the Oklahoma two-year statute of limitation quoted *supra* would operate to bar the right of action on the part of Doroth A. Patterson and Shelby A. Patterson.

We think that the Supreme Court of Oklahoma was in error in holding that the life estate ever existed, as we have already sought to establish by the long line of authorities cited under Proposition No. 1. We think it erred again in holding that if the cause of action ever existed in so far as William M. Patterson was concerned, that it was not barred by the Arkansas seven-year statute of limitations; and this we have sought to establish by the line of authorities cited in the argument under Proposition No. 2.

As we have previously said, Chapter 97 of Mansfield's Digest of the Laws of Arkansas had been construed by the highest court of Arkansas prior to its extension in force in Indian Territory, and we now assert that when adopted by Congress and extended in force in Indian Territory, it carried with it the construction previously placed upon it by the highest court of the state from which it was adopted. In support of this contention, we respectfully direct the court's attention to the authorities cited in this brief in the discussion of Proposition No. 5. We contend that the Arkansas seven-year statute of limitations, being Section 4471 of Mans

field's Digest of the laws of said state, not only created a bar which might be plead as a defense against any action on the part of William M. Patterson to recover a life estate in the lands involved herein, but that the running of said statute of itself created a title in U. Sherman Jones, your petitioner, which title might form the basis of an action of ejectment. In other words, it is our contention that as between your petitioner and the respondents herein, the running of this seven year statute served to create a title in this petitioner which effectually destroyed and wiped out the intervening life estate of William M. Patterson, if indeed he ever had a life estate.

In this connection we are sustained by a number of decisions from the highest court of Arkansas. We first direct the attention of the court to the case of *Ferguson v. Perdue*, 51 Ark. 180, from which we quote as follows:

> "Justice Cowen, in delivering the opinion of the court in *Humbert v. Trinity Church*, said: 'So long as a man is in possession of land, claiming title, however wrongfully, and with whatever degree of knowledge that he has no right, so long the real owner is out of possession, in a constructive as well as an actual sense. It is of the nature of the statute of limitation when applied to civil actions, in effect, to mature a wrong into a right, by cutting off the remedy. To warrant its application in ejectment, the books require color of title, by deed or other documental semblance of right in the defendant, *only when the defense is founded on a* [illegible]

structive adverse possession. But neither a deed nor any equivalent muniment is necessary where the possession is indicated by actual occupation, and any other evidence of an adverse claim exists. The muniment is but one circumstance by which to make out an adverse possession.'"

Following the foregoing opinion, and still more directly in point, is the case of *Jacks v. Chaffin et al.*, 34 Ark. 534, from which we quote:

"The weight of authority in the United States seems now in favor of the doctrine that possession of land during the full period of limitation, under such circumstances as would make a valid defense, amounts to an investiture of title; which may be actively asserted, in all respects as effectively as if acquired by deed (see cases referred to in Washburn R. Property, Book III, Chap. 11, Sec. 7, sub. sec. 48). This Court has repeatedly approved this view of the effect of the statute. It was applied to a case of personal property in *Hicks v. Flint*, 21 Ark., p. 463, and is announced, or underlies the reasoning in *Sharp v. Johnson*, 22 Ark. 79; *Walker v. Towns*, 23 Ark. 147; *Kirby v. Vantrue et al.*, 26 Ark. 368; *Mayo & Jones v. Cartright*, 30 Ark. 407; *Mooney et al. v. Coolidge, id.* 640; *Ferguson v. Pelts* (M. S.). The continuity of possession always insisted upon, has reference to the time during which the statute is running—and is not necessary after the bar has attached."

To the same effect is the case of *Logan et al. v. Jelks*, 34 Ark. 547, from the body of the opinion in which case we take the following language:

"Conceding the patent from the United States to

> have been void, it may be, nevertheless, used to give color of title and fix the limits of possession, and a continuous adverse possession under it, or without any color at all, when the limits of possession may be shown for a period of over seven years as against parties whose rights are not saved, will create a title which may be used to maintain an action of ejectment. This question has been directly decided in the case of *Jacks* v. *Chaffin*, at the present term, and the principles of that case govern this."

We might cite numbers of authorities from other jurisdictions to the same effect, but we do not deem it necessary to do so inasmuch as we take it that this construction by the Supreme Court of Arkansas was adopted along with the said Chapter 97 of Mansfield's Digest itself.

What we particularly wish to stress at this time is the fact that these cases uniformly hold that title by continuous adverse possession for seven years under this seven-year statute of limitations, now under consideration, of itself creates title in him who holds adversely, and this, even though his deed or instrument of title be absolutely void, and the holding is the same even though he possesses no color of title whatever.

In the case now before the Court your petitioner was in undisputed adverse possession of the lands in question for nearly twice the statutory period of seven years before any action was ever filed by the respondents. In

der the foregoing holdings of the Arkansas court this of itself created title in him, even if it be held that his deed was absolutely void; and this being true, the creation of title in him automatically terminated and put an end to the life estate of William M. Patterson, and there was no intervening life estate when Doroth A. Patterson and Shelby A. Patterson came of age to prevent the running of the Oklahoma Statute of Limitations as against them. The opinion of the Supreme Court of Oklahoma is therefore necessarily erroneous.

Hence it is our contention that even though the deed, under which your petitioner claims, is absolutely void, the Arkansas seven-year statute of limitations served to bar any recovery herein on the part of William M. Patterson; and that it also ran as against the other respondents herein, subject to their rights to bring their action within two years after coming of full age. Doroth A. Patterson and Shelby A. Patterson attained full age more than two years Before the filing of this suit, and their cause of action, if any, is therefore effectually barred.

Proposition No. 5.

When a statute of one state or nation is adopted by another state or nation, such adoption carries with it, and adopts, the construction given to such statute by the highest court of the state from which it was adopted, if it was construed by such court prior to such adoption.

While this proposition is not set out separate and apart in the assignments of error in the petition filed herewith, yet it has been referred to in a number of these assignments and is inextricably interwoven with all of them to such extent that we have deemed it advisable to discuss it separately, referring to the authorities here cited when it is necessary to discuss it in connection with the discussion of the assignments of error discussed under Propositions Nos. 1, 2, 3 and 4.

This proposition is of vital importance in this case, due to the fact that, as will have been seen from the propositions previously discussed, the Arkansas statutes extended in force in Indian Territory by Federal enactments prior to statehood had been construed by the Supreme Court of Arkansas prior to such extension; and it is upon these Arkansas statutes and the constructions placed thereon by the highest court of the state of Arkansas prior to their adoption, that the rights of the parties in this case are, to a large degree, based.

In the case of *Edward M. Willis and William G. John, Assignees, v. Eastern Trust and Banking Com-*

pany, 169 U. S. 295, 42 Law ed. 752, the Supreme Court of the United States lays down the rule as follows:

> "Where an Act of Congress has been taken from a state statute the known and settled construction which such statute has received in the state before the original enactment of the Act of Congress, must be considered as having been adopted by Congress with the text thus expounded."

This case is exactly in point in discussing the Arkansas statutes which were adopted by Congress and extended in force in Indian Territory prior to statehood.

To the same effect is the case of *Charles Warner v. Texas & Pacific Railway Co.*, 164 U. S. 416, 41 L. ed. 495. From the body of this opinion we take the following extract:

> "It thus appears to have been the settled construction of this clause of the statute in England, before the Declaration of Independence, that an oral agreement which, according to the intention of the parties, as shown by the terms of the contract, might be fully performed within a year from the time it was made, was not within the statute, although the time of its performance was uncertain, and might probably extend, and be expected by the parties to extend, and did in fact extend, beyond the year. The several states of the Union, in re-enacting this provision of the statute of frauds in its original words, must be taken to have adopted the known and settled construction which it had received by judicial decisions in England. *Tucker v. Oxley*, 9 U. S. 5 Cranch 34; *Peacock v. Dalogue*,

27 U. S. 2 Pet. 1, 18 (7:327, 333); *McDonald v. Hovey*, 110 U. S. 619, 628 (28:269, 271)."

See also the case of *Theodore F. Brown v. John W. Walker, U. S. Marshal*, 161 U. S. 591, 40 Law ed. 819, from the syllabus of which we take the following extract:

"Where one state adopts the laws of another, it is also presumed to adopt the known and settled construction of those laws by the courts of the state from which they are taken."

See also *Hamilton v. Russell*, 1 Cranch 309; *Peacock v. Dodgson*, 2 Pet. 1.

The Supreme Court of the State of Oklahoma, in a long line of decisions, has adopted the foregoing rule and we respectfully direct the Court's attention to a number of these from that state.

From the syllabus of the case of *St. Louis & S. F. R. Co. v. Brewer*, 52 Okla. 349, 152 Pac. 1103, we take the following extract:

"Where a statute is taken from another state which had been previously construed by the highest court of that state, the statute is deemed to have been adopted with the construction so given it."

The Supreme Court of Oklahoma lays down the rule in even stronger language in the case of *Amsden v. Johnson et al.*, 74 Okla. 295, 158 Pac. 1148, from which we quote as follows:

"Where a statute is adopted from another state, the decisions of the supreme court of the state from which adopted, construing such adopted statute, rendered prior to the adoption of such statute by this state, are controlling."

See also:

Council v. Eldridge et al., 71 Okla. 223, 177 Pac. 79.

Green v. Owen et al., 73 Okla. 146, 175 Pac. 345.

Braden v. Gulf Coast Lumber Co., 89 Okla. 215, 215 Pac. 202.

One of the very latest pronouncements on this point by the Supreme Court of the State of Oklahoma is in the case of *Reed et al. v. State ex rel. Roff*, 89 Okla. 165, 230 Pac. 362. The first paragraph of the syllabus of this case is as follows:

"Where a statute taken from another state has at the time of its adoption been construed by the highest court of the state from which it was taken, it is presumed that the legislative body which adopted such statute adopted it as construed by such highest court. *Council v. Eldridge*, 71 Okla. 223, 177 Pac. 79."

We do not deem it necessary to cite other authorities on this point as the decisions, both of the United States Supreme Court and of the Supreme Court of Oklahoma, seem to uniformly uphold our contention as set forth in this proposition.

In the light of these authorities, it would seem that

there can be no question but that when Congress, in its wisdom, extended the laws of Arkansas in force in Indian Territory the constructions previously placed upon those laws by the Supreme Court of Arkansas were likewise adopted and extended in force in said territory; and this being true, there can be no doubt that, under the construction given by said court to Chapter 73 of Mansfield's Digest of the laws of Arkansas, the United States Court for the Southern District of Indian Territory had power to order and confirm the sale of the lands involved herein.

Under the construction given by said court to Chapter 20 and Chapter 49 of Mansfield's Digest of the laws of Arkansas, no curtesy right existed in William M. Patterson; and under the construction given by said court to Chapter 97 of Mansfield's Digest of the laws of Arkansas, the statute of limitations would have barred the right of action of William M. Patterson, if he ever had one, and would have terminated any intervening life estate in him, so that the Oklahoma statute of limitations would have run as against the minor respondents, Doroth A. Patterson and Shelby A. Patterson, who attained full age more than two years before the filing of this suit.

Proposition No. 6.

Adult heirs not condition precedent to right of minors to sell.

There was originally another Federal question raised by the respondents in their petition.

In their pleadings and in the trial of this case in the lower court respondents seemed to place their main dependence upon the proposition that there being no adult heirs of Emma Patterson at the time of the sale of these lands, said lands of said minors could not be legally sold. In other words, they took the position that under the provisions of Section 22 of the Act of Congress of April 26, 1906 (34 Stat. 137), it was necessary that there be adult heirs with whom the minor might join in the sale of their property before the minors' land could be sold.

Before the case came on for trial, however, this matter had been decided against them, and this issue was apparently abandoned by them on their appeal, and was neither urged by them nor considered by the Supreme Court in arriving at its opinion herein.

This issue was decided in the case of *Bartsch et al. v. Wolf et al.* 82 Okla. 27, 198 Pac. 306, where it is very ably discussed, and where the court holds that the existence of adult heirs is not a condition precedent to the right of minors to sell, but that a guardian of minor

heirs had the undoubted right to sell their lands through the probate courts of Indian Territory, under and in accordance with the provisions of the laws of the State of Arkansas in force in Indian Territory, irrespective of whether or not there were adult heirs.

As stated above, we are not briefing this proposition further, because it was abandoned by the respondents on their appeal to the Supreme Court of Oklahoma, and was not urged therein.

On this point, the Supreme Court of Oklahoma, in the case of *Allison* v. *Bryan*, 26 Okla. 520, 109 Pac. 934, lays down the rule as follows:

> "It is essential that all points upon which counsel rely for a reversal of a cause be made in the brief and properly made; if not so made they are waived, and it is not enough to assert in general terms that a ruling of the trial court is wrong; a fair effort must be made to prove that it is wrong or the point will not be considered as having been made."

See also *Federal Discount Company* v. *Galt*, 42 Okla. 620, 142 Pac. 300, and *Bryeman* v. *Chaney*, 27 Okla. 510, 112 Pac. 980.

CONCLUSION.

Your petitioner, by his pleading in the trial court, raises the question of equitable estoppel as against the respondent, William M. Patterson, on the ground that

he held out to your petitioner his minor children as the owners of the lands involved herein, and that he never claimed or asserted any right, title or interest therein in his own right. This is shown by his sworn petition seeking his appointment as guardian, by his petition for authority to sell the lands involved herein, and by his report of sale. He sold said lands to your petitioner as the lands of said minors, and we think that he is estopped to assert title in himself, and the trial court so found.

The Supreme Court of Oklahoma, by its opinion, did not decide this issue further than in a general way in reversing the cause as a whole.

By his pleadings in the lower court, your petitioner also plead as a defense that this action was in the nature of a collateral attack on the judgment of courts of general jurisdiction, and for that reason could not be maintained. The trial court so found, but on appeal the Supreme Court of Oklahoma did not specifically decide the issue, nor discuss it in its opinion, but based its decision on clear cut Federal questions.

Inasmuch as we do not believe either of the two last mentioned propositions to be Federal questions, we will not incumber this brief with a citation of authorities thereunder, though we believe that they are both well taken.

In conclusion, we respectfully submit that in the light of the authorities submitted by us in this brief, the writ of certorari herein prayed should be granted, and that upon the final hearing hereof this Court should reverse the judgment of the Supreme Court of the State of Oklahoma in favor of the respondents, and enter judgment herein for your petitioner.

WM. G. DAVISSON,
Solicitor for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

CASE NO. .....

U. Sherman Joines, Petitioner, vs. William M. Patterson, Doroth A. McFarland, *nee* Patterson, Shelby A. Petterson, and Howell M. Patterson, J. Allen Patterson, and Ruby E. Patterson, Minors, by Their Next Friend William M. Patterson, Respondents.

ACKNOWLEDGMENT OF SERVICE OF PETITION AND BRIEF IN SUPPORT THEREOF.

We, the undersigned, attorneys of record for the respondents, and each of them, do hereby acknowledge service of a copy of the attached and foregoing petition and brief in support thereof, in the above styled and numbered cause, on this the.... day of February, 1926.

HATCHETT & SEMPLE,
HAYES & McINTOSH,
Attorneys for Respondents.

IN THE SUPREME COURT OF THE UNITED STATES.

CASE NO. .....

U. Sherman Joines, Petitioner, vs. William M. Patterson, Doroth A. McFarland, *nee* Patterson, Shelby A. Patterson, and Howell M. Patterson, J. Allen Patterson and Ruby E. Patterson, Minors, by Their Next Friend, William M. Patterson, Respondents.

NOTICE.

To Hatchett & Semple and Hayes & McIntosh, Counsel for Respondents.

Please take notice that on Monday, the ..... day of March, 1926, upon the opening of the court, or as soon thereafter as counsel can be heard, the foregoing petition and brief, together with a certified copy of the entire transcript of the record of the case, will be presented and submitted to the Supreme Court of the United States, in its court room in the Capitol at Washington, D. C., in pursuance of its rules, in such cases made and provided.

Dated this ..... day of February, 1926.

WM. G. DAVIDSON,
Counsel for Petitioner.

We, the undersigned, being all the attorneys for respondents, do hereby acknowledge that a copy of the above and foregoing notice of presentation to the Supreme Court of the United States was served on us on this the ____day of February, 1926.

HATCHETT & SEMPLE,
HAYES & McINTOSH,
Counsel for Respondents.